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Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~341~~ 67

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SAMUEL SPEVACK, PETITIONER,

vs.

SOLOMON A. KLEIN.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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PETITION FOR CERTIORARI FILED JANUARY 24, 1966  
CERTIORARI GRANTED MARCH 21, 1966

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 944

SAMUEL SPEVACK, PETITIONER,

vs.

SOLOMON A. KLEIN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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[fol. A]  
**IN THE SUPREME COURT OF THE STATE  
 OF NEW YORK, COUNTY OF KINGS**

**EXHIBIT 2791**

**THE PEOPLE OF THE STATE OF NEW YORK**

To Samuel Spevack  
 66 Court Street  
 Brooklyn, N. Y.

**GREETING:**

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, at an ADDITIONAL SPECIAL TERM OF THE SUPREME COURT FOR THE COUNTY OF KINGS, at Room Number 301, 3rd floor, Borough Hall, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 12th day of June, 1958, at 10:00 o'clock, in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in the said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated January 21, 1957, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid, the following records pertaining to your business as an attorney for the period January 1, 1953 through December 31, 1957:

1. Day Book (reflecting daily receipts; 2. Cash Receipts Book; 3. Cash Disbursements Book; 4. Check Book Stubs; 5. Petty Cash Book; 6. Petty cash vouchers; 7. General Ledger and General Journal; 8. Cancelled checks, bank statements, duplicate deposit slips of regular and special checking accounts, open and closed; 9. Pass books and evidences of accounts, other than checking accounts, with all

depositories, such as savings banks, savings and loan associations, postal savings, credit unions, etc.; 10. Record of all loans made from financial institutions and others, open and closed; 11. Payroll records consisting of (a) Payroll Book, (b) Social Security and Withholding Tax Returns; 12. Copies of Federal and State Income Tax Returns and accountants' work sheets relative thereto, now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court, and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of said Supreme Court, presiding at the said Additional Special Term thereof, at said Borough Hall, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York, on the 2nd day of June, 1958.

JOSEPH B. WITTY  
Clerk

DENIS M. HURLEY  
Counsel for the Judicial Inquiry  
Room 301, 3rd Floor  
Borough Hall  
Court and Joralemon Streets  
Brooklyn 1, New York

IT IS HEREBY STIPULATED that, the above matter having been adjourned to the       day of       195 , the undersigned Witness is hereby excused from attending on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated:       195

Witness

Counsel for the Judicial Inquiry



[fol. B]

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

Present—Hon. George J. Beldock, Presiding Justice, Hon. Henry L. Ughetta, Hon. Philip M. Kleinfeld, Hon. Marcus G. Christ, Hon. Arthur D. Brennan, Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH THEM, IN THE COUNTY OF KINGS.

ORDER DESIGNATING COUNSEL—Entered January 2, 1963

An order having been made by this court on January 21, 1957, directing a judicial inquiry and investigation as to the matters set forth in the petition of the Brooklyn Bar Association, and this court having designated Mr. Justice Edward G. Baker, effective January 2, 1959, to conduct such inquiry and investigation in place of Mr. Justice George A. Arkwright, retired, and having designated Mr. Denis M. Hurley, an attorney and counselor at law to aid said Justices in the conduct of such inquiry and investigation, and it appearing that the said Mr. Justice Edward G. Baker has taken testimony and filed in this court an intermediate report, dated December 21, 1962, relative to the following attorney:

**Samuel Spevack,**

and pursuant to Section 90 of the Judiciary Law, it is

Ordered, that Solomon A. Klein, Esq., an attorney, is hereby designated and directed to institute in this court disciplinary proceedings against the above named attorney, Samuel Spevack (admitted 2nd Dept. March 3, 1926), based on his misconduct as indicated in the aforesaid intermediate

report of Mr. Justice Edward G. Baker, and as indicated in the evidence and exhibits adduced in said judicial inquiry and investigation, or any other evidence that may be [fol. C] available, and that such disciplinary proceedings be instituted and prosecuted as soon as may be practicable.

Enter:

George Beldock, Presiding Justice.

[fol. E]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

In the Matter of

Samuel Spevack, Attorney-Respondent.

PETITION OF SOLOMON A. KLEIN—July 8, 1963

To the Honorable Presiding Justice and Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The petition of Solomon A. Klein respectfully alleges:

1. That by order of this Court, dated and filed January 2, 1963, petitioner was duly designated and directed to institute in this Court disciplinary proceedings against the respondent, Samuel Spevack, as an attorney and counselor-at-law, based upon his misconduct as an attorney and counselor-at-law as set forth in the report of Hon. Edward G. Baker, a Justice of the Supreme Court of the State of New York, presiding at the Additional Special Term, Kings County, filed with the Clerk of this Court, dated December 21, 1962, and as indicated in the evidence and exhibits presented before the Additional Special Term, Kings County, or any other evidence that may be available, in a proceeding established by order of this Court dated Janu-

ary 21, 1957, as amended by order dated February 11, 1957, all as more fully hereinafter described.

2. That the said order of January 2, 1963 was duly made and filed by this Court in the proceeding established by the said order of January 21, 1957, as amended by order dated February 11, 1957, which is entitled, "IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED [fol. F] ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS-AT-LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS," (hereinafter called "Judicial Inquiry").

3. Upon information and belief that the respondent Samuel Spevack was admitted to practice as an attorney and counselor-at-law in the courts of the State of New York by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, in March 1926, and has ever since acted as such attorney and counselor-at-law.

4. Upon information and belief, that the respondent Samuel Spevack, resides in the County of Kings, State of New York, and that at all times hereinafter mentioned he was an attorney practicing law with an office in the County of Kings, State of New York.

5. Upon information and belief, that during the course of a judicial inquiry and investigation that was directed to be made by the aforesaid order dated January 1, 1957, the respondent Samuel Spevack in response to a subpoena duces tecum, dated June 2, 1958, served upon him, appeared before Mr. Justice George A. Arkwright, then presiding at the Additional Special Term of this Court, on June 12, 1958. At the request of said respondent, the said Samuel Spevack was granted several adjournments to June 26, 1959 when the said Samuel Spevack appeared before Mr. Justice Edward G. Baker presiding at the Additional Special Term of this Court.



6. Upon information and belief, that on June 26, 1959, the said respondent Samuel Spevack was duly sworn as a witness and was directed to produce the records required to be produced by him pursuant to said subpoena duces tecum and the said respondent Samuel Spevack refused [fol. G] to produce any of the particular records enumerated in the said subpoena duces tecum upon the ground that the production of such records might tend to incriminate or degrade him or subject him to some penalty or forfeiture.

7. Upon information and belief, that thereafter and on or about the 26th day of June, 1961, the respondent Samuel Spevack requested that he be permitted to appear before the Justice presiding at the Additional Special Term, Kings County, to testify and to produce the books and records required by the said subpoena duces tecum.

8. Upon information and belief, that pursuant to the foregoing request, the respondent Samuel Spevack appeared on January 10, 1962 as a witness before the Justice presiding at the Additional Special Term. Except for his acknowledgment of due service upon him of a subpoena duces tecum in June, 1958, respondent Samuel Spevack refused to answer any of the questions that were then asked of him and respondent Samuel Spevack further refused to then produce the financial records required of him to be produced by the said subpoena duces tecum, claiming his Constitutional privilege against self-incrimination. The respondent Samuel Spevack was then apprised of the possible serious consequences that might flow from his refusal to answer the questions that were propounded to him; that his failure to answer might give rise to disciplinary action. Respondent Samuel Spevack was further apprised of the controlling case law and in particular of the decision of the United States Supreme Court in *Cohen v. Hurley*, 366 U.S. 117, affirming 9 App. Div. 2nd 436, affirmed 7 N.Y. 2nd 488, *sub. nom.*, *In the Matter of Albert Martin Cohen, an Attorney*, pertinent statutory provisions

of the Penal Law and particular Canons of Ethics, but the respondent Samuel Spevack persisted in his refusal to give testimony and persisted in his refusal to produce his financial records required of him to be produced by the subpoena duces tecum as aforesaid.

9. Upon information and belief, that thereafter and on the 9th day of July, 1962 the respondent Samuel Spevack again appeared as a witness before the Justice presiding at the Additional Special Term, Kings County, and on said day the respondent Samuel Spevack again refused to produce his financial records required by him to be produced by the said subpoena duces tecum upon the ground that to answer the questions or to produce such financial records might tend to incriminate or degrade him or subject him to a forfeiture or a penalty and upon the additional ground that to require him to produce such financial records would be violative of the Fourth Amendment to the United States Constitution and Article 1, Section 12 of the Constitution of the State of New York.

10. Upon information and belief, that the respondent Samuel Spevack has been guilty of professional misconduct and conduct prejudicial to the administration of justice in his office as an attorney and counselor-at-law, in that:

(A) The refusal of the respondent Samuel Spevack to produce the records set forth in the subpoena duces tecum alleged in paragraph "5." above and his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his

refusal to answer the aforesaid questions the respondent [fol. I] hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.

(B) That in addition to and wholly apart from respondent's repeated refusal to testify and to produce his financial records, the said respondent Samuel Spevack wilfully and contumaciously obstructed and impeded the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his deliberate failure to appear on various adjourned dates and by authorizing and instructing counsel appearing on behalf of respondent at the Additional Special Term to make and give statements, representations and information to the Court, which statements, representations and information were untrue, whereby both the Court and counsel for respondent Samuel Spevack were deceived.

(C) During the period 1953 to date, the respondent Samuel Spevack has failed to file statements with this Court regarding retainers accepted by him to perform services in connection with personal injury and property damage claims on a contingent-fee basis.

(D) During the period 1953 to date, the respondent Samuel Spevack filed with the Appellate Division of the Supreme Court, Second Judicial Department, statements of retainer pursuant to the Special Rules of the Appellate Division, Second Judicial Department, which said statements of retainer set forth statements made by the said respondent to be false and untrue and thereby said respondent Samuel Spevack practiced a deceit on this Court.

(E) During the period 1953 to date, the respondent [fol. J] Samuel Spevack commingled clients' monies with his own.



(F) During the period 1953 to date, the respondent Samuel Spevack failed to keep proper books and records of his financial transactions with his clients.

(G) During the period 1953 to date, the respondent Samuel Spevack failed to submit to clients upon the closing of cases, statements in writing setting forth the amounts received and separately specifying the sums due respondent for services and disbursements.

(H) That during the period 1953 to date, the respondent Samuel Spevack prepared and served bills of particulars in actions in which he was the attorney, which bills of particulars contained false and exaggerated claims, the falsity of which was known or should have been known to the said respondent.

(I) That during the period 1953 to date, the respondent Samuel Spevack has divided fees received by him in contingent negligence matters with attorneys who had forwarded such contingent negligence matters to him but who did not actually perform legal services or share responsibility in such cases.

(J) That during the period 1953 to date, the respondent Samuel Spevack individually, and in concert with other attorneys, violated the Canons of Professional Ethics by representing conflicting interests.

11. That respondent Samuel Spevack knew or should have known in committing the acts aforesaid, he was violating applicable statutes of the State of New York, the Canons of Professional Ethics adopted by the New York State Bar Association January, 1909, as amended, the Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the Second Judicial Department, Section 273 of the Penal Law, and his inherent duty as an attorney and counselor-at-law.

[fol. K] . 12. That no previous application has been made for the relief herein asked.

13. That the sources of petitioner's knowledge and the grounds of his belief are the facts in evidence set forth in the testimony and exhibits taken and adduced before the Hon. Edward G. Baker in said Judicial Inquiry conducted by him, and in the said report of Hon. Edward G. Baker filed with the Clerk of this Court and dated December 21, 1963.

14. That an order to show cause is asked for herein, instead of service of a notice of motion, in order that the Court may be fully apprised of the charges made against the respondents in advance of the service thereof upon them, and to enable the Court to fix the return date of the order to show cause, all in accordance with the practice observed in such matters.

Wherefore, petitioner prays that an order may issue to the respondent Samuel Spevack, directing that he show cause before this Court why an order should not be made herein directing that he be disciplined upon the charges set forth herein, and for such further action as may be contemplated by Section 90 of the Judiciary Law of the State of New York, in accordance with the practice directed to be observed in the disposition of such matters by the courts of this State.

Dated: Brooklyn, New York, July 8th, 1963.

Solomon A. Klein, Petitioner.

[fol. L] *Duly sworn to by Solomon A. Klein, jurat omitted in printing.*

[fol. M] *Affidavit of Service (omitted in printing).*

[fol. 1]

**IN THE SUPREME COURT OF THE STATE OF NEW YORK**  
**APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT**

**In the Matter of Samuel Spevack,**  
**Attorney.**

**SOLOMON A. KLEIN, Petitioner,**

**—against—**

**SAMUEL SPEVACK, Attorney-Respondent.**

**Excerpts From Transcript of Proceedings**

**Brooklyn, New York**  
**June 2, 1964.**

**Before:**

**Hon. Harold F. McNiece, Referee.**

**APPEARANCES:**

**Solomon A. Klein, Esq., Petitioner Pro Se.**  
**Messrs. Shatzkin and Cooper, Attorneys for Respondent,**  
**Bernard Shatzkin, Esq., of counsel.**  
**Milton Friedman, Official Reporter.**  
 [fol. 2]

**OFFERS IN EVIDENCE AND COLLOQUY THEREON**

**Mr. Klein:** May it please your Honor, as a result of conversations had with counsel—

**The Referee:** Excuse me. Off the record.

**(Discussion off the record.)**

**The Referee:** We will now go on the record, and I will open the hearing. Let the record show that this hearing is



being held pursuant to an order of the Appellate Division of the Supreme Court, Second Judicial Department, made and filed the 23rd of September, 1963, appointing me as a Referee to hear and report in the matter of Solomon A. Klein, Petitioner, and Samuel Spevack, attorney-respondent.

First, I would like to offer in evidence the Referee's oath and ask that it be marked Referee's Exhibit I.

(Received in evidence and marked Referee's Exhibit I).

(Handed to Mr. Klein.)

Mr. Klein: Fine.

(Handed to Mr. Shatzkin.)

The Referee: Is the petitioner ready?

Mr. Klein: Yes, your Honor.

[fol. 3] Mr. Klein. Yes. I first offer in evidence the respondent's statements of retainer filed with the Appellate Division for the following years: For the year 1953, 119 statements of retainer; the year 1954, 150; the year 1955, 154; for the year 1956, 157; for the year 1957, 155; for the year 1958, 143; for the year 1959, 129; and for the first six months of the year 1960, 55; making a total of 1,053 statements of retainer during the years that I have mentioned.

The reason, your Honor, for the six-month period in 1960 is that after that six-month period subsequent statements of retainer have to be filed with the Judicial Conference, and at the time of the investigation of this matter they had gone up only to the first six months of 1960.

[fol. 6] (Received in evidence and marked Petitioner's Exhibit 1.)

Mr. Shatzkin: Well, may I inquire what the purpose of the offer is then?

Mr. Klein: The purpose—my sole purpose of the offer is to show the extent and nature of the respondent's practice—namely, that he was engaged to a substantial extent in the practice of personal injury and property damage cases on a contingent fee basis.

Mr. Shatzkin: We are ready to concede that that is the fact.

[fol. 8] Mr. Klein: I will now state for the record what I had said off the record—namely, that petitioner is limiting the presentation of his proof under the petition to all allegation down to and including paragraph 10-B of the petition and will offer no evidence as to paragraph C—let me put it this way—I am sorry—paragraph C of paragraph 10, paragraphs D, E, F, G, H, I and J.

Now, with reference to the charges upon which proof will be offered by petitioner, I now offer in evidence the stenographic transcript of the proceedings had with respect to the inquiry into the conduct of the respondent, Samuel Spevack, before the Additional Special Term of the Supreme Court of Kings County in charge of the Judicial Inquiry.

The Referee: Any objection?

Mr. Shatzkin: No objection. And I do understand, sir, that I may have a copy of this upon payment of the appropriate stenographic fees, if I should so desire it.

Mr. Klein: Yes, certainly.

[fol. 9]

OFFERING, RECEIVING AND READING INTO RECORD,  
PETITIONER'S EXHIBIT 2

The Referee: Received as Petitioner's Exhibit 2.

Mr. Klein: I am turning this over to the court stenographer with the request that it be transcribed into the record.

(Received in evidence and marked Petitioner's Exhibit 2.)

(Petitioner's Exhibit 2 is as follows:

June 12, 1958.

Mr. Donlan: The next witness is Samuel Spevack.

(Mr. Spevack enters the courtroom.)

Mr. Donlan: Your Honor, I had sent a request to Mr. Samuel Spevack of 66 Court Street, calling for the production of his records, his financial records, relative to his business as an attorney, for the period from January 1, 1953, through December 31, 1957.

I had spoken to Mr. Spevack on the phone. He indicated he had a request to make of you this morning.

The Court: Mr. Spevack, good morning.

Mr. Spevack: Your Honor, I have tried to reach Mr. Donlan now for several days. I have been over at the pre-trial sessions now since they started and before they [fol. 10] started. We don't get out until almost 6:00 o'clock. Every day I get in the office later. I have an associate helping me. These cases are going on today, day after day. They have been adjourned now for next week and the week following.

The Court: When is that call over, Mr. Spevack?

Mr. Spevack: The call officially is over today, but there have been adjournments down until—I had one this morning as late as June 23rd. I have them down for the 24th and 25th, as late as yesterday.

Now, whether you have one case or ten cases, you don't know whether you get out at a quarter to 6:00 or not. I have been getting out very late every night.

The Court: What is the situation now?

Mr. Donlan: Your Honor, we have asked—

The Court: Is Mr. Spevack called as a witness this morning?

Mr. Donlan: I indicated to him, your Honor, that I wanted his books this morning and as I said to you, he told me on the phone—

The Court: It is just on books. You don't want him to testify this morning?

[fol. 11] Mr. Donlan: I don't want him to testify particularly this morning. I would like if Mr. Spevack would state whether he is going to produce his books. Whether he produces them today or tomorrow is not of the essence.

The Court: What period are you asking for?

Mr. Donlan: From January 1, 1953, through December 31, 1957. It is really the years of 1953, 1954, 1955, 1956 and 1957.

The Court: What do you say to that, Mr. Spevack?

Mr. Spevack: To what, sir?

The Court: Mr. Donlan wants you to submit, if you will, to the accounting staff, your books for 1953, 1954, 1955, 1956 and 1957.

Mr. Spevack: Your Honor, I have already said I have been trying to get through my records. I have many, many checks—

The Court: Haven't you got some of them that could be brought over?

Mr. Spevack: That would not be fair, your Honor, if I can't get all of them together.

The Court: You will submit them?

Mr. Donlan: That is the question I ask.

[fol. 12] Mr. Spevack: Let me say this also in utter frankness, your Honor—

The Court: That is what we want.

Mr. Spevack: When Mr. Donlan called me before he sent the subpoena over, I told him what the pre-trial problems were. He said, "If you need an adjournment, there would be no difficulty in getting one." I think those were his words in substance. Since then—I think he telephoned me on June 2nd—since that time, as I have already explained to your Honor, the position across the street.

The Court: I understand that.

Mr. Spevack: I have made some efforts to get at some of my canceled checks, vouchers and other personal records, because I have had business transactions.

The Court: If it would simplify matters, why can't we take some of the years at a time—



Mr. Spevack: I don't have them in that fashion.

Mr. Donlan: Your Honor, I would like, if Mr. Spevack is in a position to do so, to have him say whether he will produce his books. I am not insisting to get them today, tomorrow or the day after.

[fol. 13] The Court: Will you produce your books?

Mr. Spevack: I also have not had an opportunity to confer with myself or with counsel in respect to the position that I should take.

The Court: Are you going to have counsel?

Mr. Spevack: I don't know. After receiving the communication from the Committee over at the Bar Association—

The Court: In the absence of your statement that you are undecided, I suppose the answer is you can't tell at this time.

Mr. Spevack: Yes, we received a communication from the Bar Association Committee, I think, a week ago. I barely had a chance to glance at it. I don't know what position I will take or should take or that the Bar should take—

Mr. Donlan: What has the Bar got to do with this, Mr. Spevack? I don't understand that, for the record.

Mr. Spevack: I have engaged, your Honor, in the course of my 30-odd years of practice, in private business ventures. Some were sound, some not sound. The moneys that were drawn in respect to those ventures were all taken from my [fol. 14] shares of the fees and the records must necessarily be intermingled. I have never kept a bookkeeping system all my life.

The Court: If they are intermingled, of course—

Mr. Spevack: In this sense, your Honor: I have always had more, so much more than my shares of the fees in the special account that I am proud to say that Mr. Love one day said to me in the bank, "You are one of our best depositors here." So I have never mingled my funds with clients' funds in the sense that I deposited checks received in a special account.

The Court: Where are those records that you are required to keep under Rule 4?

Mr. Spevack: Sir?

The Court: Where are the records you are required to keep under Rule 4, which is the rule requiring you to have set up a special account?

Mr. Spevack: They are in my check book.

The Court: Why can't those be produced?

Mr. Spevack: I am trying to say, your Honor, that the years 1953 to 1957, I moved my apartment in April of 1957. I have never had what you call a bookkeeping system as [fol. 15] such. Some of them were home, some of them were in the office, and I had not had complete opportunity just for lack of physical time.

I have also had this. My 1955 records have been examined by—they are going over my 1955 records, the Internal Revenue. They are being checked. I have had to get a lot of stuff for them. There just aren't enough hours in the day right now to get them.

#### COLLOQUY RE ADJOURNMENTS

The Court: I will give you a short adjournment so that you can kind of assemble your thoughts and assemble your books and see where you are. This call, this calendar call, you say is over tomorrow?

Mr. Spevack: The cases are being adjourned.

The Court: If we give you a week, that is plenty of time.

Mr. Spevack: Your Honor, I would say on Monday we already have five cases.

The Court: This is going to come ahead of that, I am afraid.

Mr. Donlan: Your Honor, if I might—

The Court: You have to make a choice and, of course, this investigation will come ahead of settlements.

[fol. 16] Mr. Spevack: It is not settlements.

The Court: Whatever they may be. They are usually settlements over there. There are no trials.

Mr. Donlan: Your Honor, my concern here is not whether I get the books or the Judicial Inquiry gets the books tomorrow or the next day, but we know from past experience that—and this is no reflection on Mr. Spevack—but lawyers have come in and said they couldn't get their books together and so forth, and three or four months later they finally come in and state their position. It is my opinion that it shouldn't take any lawyer three or four months to decide whether or not he is going to produce his books.

I can appreciate Mr. Spevack's position that if his books are a bit here and there, as he indicated, a little bit upset and so forth, I can understand it might take him a little while to get them together, but I don't think it should take any man too long to decide whether he is going to produce his books.

That is the main question I would like to raise this morning. When he produces them, I am prepared to take them three weeks from now if he says he is going to produce [fol. 17] them.

The Court: You want to know now whether he will produce them or not?

Mr. Donlan: Yes; if he can't answer now, I would like to get an answer as soon as he can give us an answer.

The Court: We are waiting for your answer.

Mr. Spevack: I am trying to deliberate, your Honor.

The Court: I assume you have nothing to hide, so why shouldn't you bring them in?

Mr. Spevack: I say this, Judge: I have many private business ventures in the years that I have been in practice, and they are asking for the checks that were drawn for those that come out of funds which were in the special account.

As I said before, the account has always been more than adequate to supply any funds which the clients were entitled to.

The Court: That doesn't answer the question. The question is, Are you going to produce the books or will they have to be subpoenaed? That is what it comes down to.

[fol. 18] Mr. Spevack: I must ask for some time to deliberate on that, your Honor.

The Court: I don't think it requires much time. How much time do you want to deliberate on it?

Mr. Spevack: I would say in light of personal problems, I would say two weeks.

The Court: No, no. I will give you until Tuesday morning and you may then come in and give us your answer.

Mr. Donlan: At that time, your Honor, if it pleases you, I would like Mr. Spevack to take the stand. I am going to put him on notice that we are going to ask him to take the stand.

The Court: 10:00 o'clock Tuesday, June 17th.

Mr. Spevack: May I say this, as I tried to get Mr. Donlan following his original conversation with me, if I had known that it would be so precipitate, that I would have had to drop anything, I would have tried to consult with myself this last week, something which I did not feel that there had been any urgency to do, because as he told me on June 2nd, "If you will require any additional time, there should be no problem in getting it." And I have tried to get him [fol. 19] since Tuesday. I have made several phone calls to try to reach him.

The Court: This is Thursday and Tuesday gives you plenty of time to decide whether you will produce the books or not.

Mr. Spevack: All right.

The Court: I think you could decide that—I know I could—in ten minutes. I wouldn't even need ten minutes. I could decide it immediately.

Tuesday, at 10:00 o'clock.

(Mr. Spevack leaves the courtroom.)

June 17, 1958.

(Mr. Spevack enters the courtroom with his attorney.)

The Court: Good morning, Mr. Spevack.



Mr. Berman: David T. Berman, 26 Court Street, Brooklyn.

The Court: You are appearing for Mr. Spevack?

Mr. Berman: Yes, your Honor.

[fol. 21] Mr. Donlan: Your Honor, what Mr. Berman says is true about advising me yesterday. He did come over and I spoke to him. I have no objection to adjourning it until 10:00 A.M. on the 24th of June, at which time we trust Mr. Spevack or his attorney, or both, will have some statement as to their position relative to the records. That is the only concern I have, is that on that date they will give us a statement as to Mr. Spevack's position.

[fol. 22] Brooklyn, New York, Tuesday  
June 24, 1958.

Mr. Donlan: Your Honor, this is the matter of a subpoena served on Samuel Spevack, attorney, represented by Mr. Berman, who appeared here on the 17th.

Mr. Berman:

In this particular instance I have an application pending before the Appellate Division for relief as against the subpoena issued herein.

[fol. 24] The Court: This will be adjourned without date.

Mr. Berman: Thank you very much.

[fol. 25] November 14, 1958.

Your Honor, I would like to add to the calendar, if I may, an attorney who is outside, an attorney for the Chemical Corn Exchange Bank at 50 Court Street, who is here with Mr. Love of the Chemical Corn, in answer to a subpoena duces tecum served on them, substantially requesting the

transcripts of accounts of Samuel Spevack, an attorney, with the Chemical Corn Exchange Bank.

I believe the attorney for the bank has a request for an adjournment due to a necessity of needing more time to get these records.

In this connection, an attorney named David T. Berman, who represents Samuel Spevack, I understand, to say something relative to that.

The Court: We will ask the attorney for the bank to come in.

(Hamilton Love, vice-president of the Chemical Corn Exchange Bank, and Maxim Buchwalter, attorney for the bank, both enter the courtroom.)

The Court: Mr. Buchwalter, you have an application, have you?

[fol. 28] Mr. Buchwalter: Do you want the checks charged against the accounts?

Mr. Donlan: My answer to that is that there are checks that were drawn on the bank, we want them if you have them, cashier's checks. Did you make records of checks that were drawn on the bank?

Mr. Buchwalter: Drawn by the depositor?

Mr. Donlan: Yes.

Mr. Buchwalter: We have a record of those checks.

[fol. 29] Mr. Love: If you ever try to get them, you will find it is difficult.

[fol. 30] Mr. Love: There is one question there. Our client objects to our delivering any records without an order of the court.

The Court: I will take that up with him.

[fol. 31] Mr. Donlan: Your Honor, I would like the bank, if they would, to proceed to get these records and not wait.

The Court: We may as well have a test case on that.

Mr. Buchwalter: Your Honor, may we be present while Mr. Berman appears before you?

The Court: I have no objection. I don't want you to join in the discussion.

Mr. Buchwalter: We won't join. As far as we are concerned, we are going to get the records ready for you.

The Court: However, you know, this is a secret investigation and you are not supposed to be knowing what is going on. Maybe I had better not let you be here while he is speaking. I don't know what he will speak about. I assume I know who he is representing, but I am not sure, nor do I know that that is what he is going to speak about. [fol. 32] Inasmuch as it is a secret investigation, maybe I had better let you wait outside and then when it is over, have you come in and let you know the disposition of it.

(Mr. Love and Mr. Buchwalter leave the courtroom.)

The Court: Good morning, Mr. Berman.

Mr. Berman: May it please your Honor, I have asked permission to address the Court in connection with a matter that I understand is on this morning regarding a client of mine who is under inquiry in connection with the Judicial Inquiry pending before your Honor.

[fol. 33] The Court: Who is the client?

Mr. Berman: My client's name is Samuel Spevack, may it please your Honor, and in the Appellate Division a proceeding has been prosecuted to seek relief for him there as against an instrument, a subpoena duces tecum served upon him under the caption "Anonymous 14." That matter has been resolved against the petitioner therein and is on its way to the Court of Appeals from the determination in the Appellate Division.

At the time I learned of the instrument being returnable today, which was served upon the Chemical Corn Exchange Bank, I contacted Mr. Donlan and indicated that I would ask for an opportunity to address the Court so as to enable me, on behalf of my client, to request that the returnable phase of the instrument served on the Corn Exchange should be adjourned to give me an opportunity to take what I may deem to be adequate steps to protect my client's rights in advance of any compliance of said instrument.

That is my reason for being here today, your Honor, to make such application to give me a reasonable opportunity to do so.

[fol. 35] The Court: How much time would you need?

Mr. Berman: I think possibly not more than a week to enable me, as to what I shall try to do.

The Court: All right. I will give you a week. In the meantime the other matter has been adjourned beyond the week period, but I will give you a week anyway to make whatever application you wish.

[fol. 37]

Brooklyn, N. Y., Monday  
June 15, 1959

Mr. Caputo: The first matter on the calendar this morning, your Honor, is the matter of Samuel Spevack.

Just for the record I would like to give a summary of what has gone on. Mr. Spevack was served with a subpoena duces tecum dated June 2, 1958. Shortly thereafter he moved in the Appellate Division, Second Department, for an order vacating the subpoena duces tecum. That motion was denied by the Appellate Division by order dated July 21, 1958.

[fol. 38] Thereafter, he moved for reargument for leave to appeal to the Court of Appeals and for a stay. The Appellate Division, Second Department, denied all this relief by two orders dated October 20, 1958. Thereafter,



he moved in the Court of Appeals for leave to appeal to that Court. That motion was denied by the Court of Appeals by order dated January 15, 1959.

Thereafter, he petitioned for a writ of certiorari to the U. S. Supreme Court, October term, 1958 U. S. Supreme Court Docket No. 841, petition for writ was denied by the U. S. Supreme Court on June 1, 1959.

On June 2, 1959, I called Mr. Berman, David T. Berman, who represents Mr. Spevack, and told him that Mr. Spevack's appearance had been set before the Additional Special Term on June 11, 1959. On that day an adjournment was granted to today. Mr. Berman is here and Mr. Spevack is here.

Mr. Berman: My learned opponent has very accurately indicated what has happened by indicating the highlights of what has occurred to date.

[fol. 42] Mr. Caputo: Just to state our position, your Honor, all we would like to do here is to have Mr. Spevack —after all, we are entitled to these documents. This has been going on in the Courts for some time and the subpoena has been sustained in its entirety and we would like for him to produce the documents. There is nothing that has to be done in court here.

The Court: Isn't it that simple? I am going to grant you an adjournment. I think I should do that. Is there anything I have to decide here? Hasn't this all been gone through? Aren't we entitled to the documents?

Mr. Berman: May I most respectfully indicate to your Honor that in my humble opinion the Court is not entitled to it and I believe I can argue that at the right opportunity. [fol. 43] It is unfortunate that the coincidence of other matters has come up.

The Court: I don't want to pre-judge it, but I want to tell you now that as of this moment my dispositions would be to direct that the documents be produced pursuant to the subpoena, because so far as I can see you have ex-

hausted every possible proceeding and motion with respect to the subpoena.

[fol. 44] The Court: Counsel indicates to me that he is going to oppose this subpoena and not comply with its directions, is that right?

Mr. Berman: With basic subsisting objections, your Honor. But nevertheless it is our thought that if Mr. Spevack takes the stand, whether it be pursuant to your Honor's direction or whether it be as an officer of the Court, but nevertheless preserving his basic objection which I believe I have indicated by now that I most respectfully now reiterate for the record, all objections herein before made, if and when an occasion should arise constitutional privileges or rights or protection may be invoked at the time they arrive.

The Court: Of course.

Mr. Berman: Furthermore, I will also request—I haven't even gotten to that stage—that counsel, meaning myself, be permitted to remain during his questioning.

The Court: I will tell you now that I will permit that.

[fol. 47]

June 26, 1959.

Mr. Caputo: The next matter on the calendar, your Honor, is the matter of Samuel Spevack. As you know, the subpoena duces tecum which was served on him has been sustained right up to the United States Supreme Court. He appears today with his counsel, David T. Berman.

[fol. 50] Mr. Berman: Thank you. At this time, may it [fol. 51] please your Honor, we reserve our basic objections as hereinbefore set forth in all of the motions hereinbefore made, and we most respectfully reserve our right to interject our constitutional rights and privileges as the need or occasion arises therefor.

May it please your Honor, I most respectfully advise the Court that while my client reserves his objections, as we have just indicated, I now most respectfully advise your Honor that the items set forth in the subpoena duces tecum herein, dated June 2, 1958, are so general that they may probably compel him to assert his constitutional rights against complying therewith on the grounds that they call for matter, the contents of which may tend to incriminate or degrade my said client or subject him to penalty or forfeiture in violation of the New York State Constitution and the Constitution of the United States, as amended.

Specifically I refer at this time to Article 1, Section 6 and 12 of the New York State Constitution, and the Fourteenth Amendment to the Constitution of the United States.

I most respectfully reserve any other constitutional [fol. 52] objections which are applicable if and when the occasion arises.

I wish to thank your Honor for giving me an opportunity to maintain and to assert my client's position.

Mr. Caputo: If your Honor please, in view of the statement that was just made by Mr. Berman, may I request the Court to have Mr. Spevack be sworn so that I may ask him some questions?

The Court: Surely.

Mr. Caputo: They will be very brief.

The Court: All right.

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SAMUEL SPEVACK, 135 Eastern Parkway, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

Mr. Caputo: May the record note that while I am asking these questions of Mr. Spevack, his attorney, is present.

By Mr. Caputo:

Q. Mr. Spevack, I know you are familiar with the subpoena duces tecum that was served on you some time ago,

which was dated June 2, 1958, and which has been sustained most recently by the United States Supreme Court [fol. 53] when it denied a writ of certiorari on June 1, 1959. Do you have the documents which you are commanded to produce pursuant to this subpoena?

Mr. Berman: May it please your Honor, I most respectfully believe I can possibly correct an inadvertent error made by my learned opponent. I believe the instruments in question were sent through the mail, but we have never raised that question. The instruments were sent through the mail to my client, but we have never questioned that there was the equivalent of service.

The Court: All right.

Mr. Berman: Merely for purposes of factual accuracy. I am sorry.

By Mr. Caputo:

Q. Then, Mr. Spevack, the question is, have you produced the documents which you have been commanded to produce pursuant to this subpoena?

Mr. Berman: May it please your Honor—

The Witness: May I—

Mr. Caputo: Why don't you state that?

The Witness: May I, Mr. Berman?

Mr. Berman: Excuse me. I beg your pardon. Excuse [fol. 54] me, Mr. Spevack.

May it please your Honor, I most respectfully advise your Honor that inasmuch as we have concluded that the constitutional privileges would be asserted before your Honor, and would be set forth, I ask my learned opponent whether it would be permissible, subject to your Honor's ruling and your Honor's determination, to avoid the physical carrying of possible instruments.

The Court: I understand.

Mr. Berman: But nevertheless, not to have such avoidance be deemed in any fashion contumacious or in any contempt or in any violation of any obligation per se.



**The Court:** I understand, but I think it is Mr. Caputo's point that it is the witness who must avail himself of his constitutional privilege.

**Mr. Berman:** Yes, I realize that.

**The Court:** Counsel for him can't do that in his behalf.

**Mr. Berman:** I understand that.

**The Court:** He must avail himself of it.

**Isn't that your point?**

**[fol. 55] Mr. Caputo:** Yes.

. . . . .

**[fol. 58] The Court:** On what is before me, I must conclude that the validity of the subpoena was sustained in the Appellate Division, and appeal denied in the Court of Appeals.

. . . . .

**[fol. 59] By Mr. Caputo:**

**Q. Mr. Spevack,** in the subpoena dated June 2, 1958, which has been litigated under the name of Anonymous No. 14, there are certain documents that you are commanded to produce pursuant to it. Do you have those documents with you today?

**Mr. Berman:** I believe the matter of physical possession is not necessarily a requisite.

**Mr. Caputo:** I would like an answer. I think the witness should answer the question.

**A. I don't—I** was under the impression that counsel had entered into an agreement with respect to the production of any records in the court, and I was guided by counsel.

**Mr. Caputo:** We agreed it was not necessary, your Honor, for him to physically produce the documents.

**Mr. Berman:** Thank you.

**Mr. Berman:** But nevertheless, not to have such a void upon the fact that the witness has been ordered to produce the documents, and the witness has refused to do so, is a very serious matter.

By Mr. Caputo:

Q. Then I ask you this question, Mr. Spevack: Why have you not produced these documents?

A. On the advice of counsel.

Q. What is that, Mr. Spevack?

[fol. 60] A. Counsel has advised me that the production of the documents—may I refresh my recollection, your Honor?

Mr. Caputo: Certainly.

The Court: Of course.

A. (Continuing) I am not accustomed to the procedure. That I have been advised that every step which has been taken by me or by my counsel has been done with the greatest respect for the Court, and I respectfully ask that I shall not be deprived of my constitutional rights by virtue of the proceeding herein, and that I was guided by my counsel's advice to assert in answer to this question that the production may tend to incriminate or degrade me or to subject me to some penalty or forfeiture, and I believe that I am entitled to the same protection that is guaranteed to all other persons. There may be tax problems, there may be other problems, and I therefore, having been advised by my counsel as the situation presently stands, the Court cannot grant me immunity, that I must refuse to surrender those documents on those grounds. If I am in error in respect to the matter of immunity, I would respectfully ask to be advised on the issue.

The Court: No, you are right. You are accurate and correct.

[fol. 61] By Mr. Caputo:

Q. Just for the purpose of clarification, among the many grounds that you have just stated, one of them is the privilege against self-incrimination, is that correct?

A. May I—

**Q.** There are various grounds that you gave for refusal to surrender the records.

**A.** Yes.

**Q.** And one of those grounds is the privilege against self-incrimination?

**A.** Yes.

**Mr. Caputo:** Thank you. That is all I have, your Honor.

**The Court:** I think I should say this, and I hope you will take it in the spirit in which I say it. The Inquiry is now in the process of preparing what has been referred to here as a test case, based upon the refusal of a witness to answer relevant questions, his refusal having been based upon constitutional grounds, the plea of his privilege.

It was the thought in some quarters that such an attitude, or such a plea, made in the context of this Inquiry, might be indicative of such a lack of candor with the [sic] as to [fol. 62] warrant disciplinary proceedings based upon that ground alone.

Of course, I am not prepared to say what will be the view of the Appellate Division on that question. My own thought is that there is a very serious question to be determined in connection with that situation. But I thought that I should call it to the attention of the witness and to your attention.

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[fol. 68] **The Court:** Do you feel that the record is clear as to the basis for the witness's refusal to produce the books?

**Mr. Caputo:** Yes.

**The Witness:** Sir, May I? I am sorry.

**The Court:** All right.

To produce them and surrender them in accordance with the command of the subpoena.

**Mr. Berman:** May I hear that again?

**The Court:** The subpoena called for the production and surrender of the books, or production of the books, correct?

**Mr. Berman:** Yes.

The Court: They have not been produced, and I simply asked counsel whether the record was clear upon the reason or the basis for the witness's refusal to produce them. I think it is. There must not be any mistake about his position, that is all.

Mr. Berman: To turn over—

The Witness: Turn over, your Honor—

Mr. Berman: May I ask it be clarified, to turn over as distinguished from production, so there will be no mis-[fol. 69] understanding. Assuming, whatever the instruments are, the records are, were in Mr. Spevack's possession, we would then assert the privilege—

The Court: Wait. Am I right in this, that the basis of the witness's refusal to produce the books, leaving aside the understanding that you didn't actually have to physically bring them here today, leaving that out, the basis of his refusal to produce the books is that they might tend to incriminate him?

Mr. Berman: Yes.

The Court: Is that the basis?

(The witness shook his head in the negative.)

The Court: You better state it again. The subpoena calls for the production of the books. They have not been produced.

The Witness: Whatever records, your Honor, that were available to me, I could physically, if I had obtained the time, get them together in a package and in a bundle and bring them here alongside of me.

The Court: Right.

The Witness: I was told by counsel that Mr. Caputo had agreed that that act physically was not essential and necessary.

[fol. 70] The Court: Right.

The Witness: Therefore, if I may say, the matter of production of the books, or of bringing them here physically is not in issue.

The Court: All right, leave that out now.



Mr. Berman: Thank you.

The Witness: That the only matter in issue is the refusal to turn them over.

The Court: I think we better get this more clearly stated, counsel. Maybe we better go back and get the books. I mean I don't want that little thing to interfere with what we mean here, or to confuse the situation. If it is going to be confused, the only thing I can suggest is that counsel go to his office and bring the books here, and we will start all over again.

I want to know whether, assuming they were here, and assuming reference was made to them by counsel, and questions asked with respect to them, whether the witness's answer would be a refusal upon the basis that his answer might tend to incriminate him.

The Witness: That is basically so.

Mr. Berman: Yes.

[fol. 71] The Witness: That is the understanding.

Mr. Berman: Yes, sir, definitely so.

The Court: Then the record I think is clear.

Mr. Berman: Thank you.

Mr. Caputo: Yes. I thought it was.

The Court: I don't want to belabor the point, but I do feel that in this kind of a situation, and you very well know, the record must be absolutely clear as to whether or not the witness pleaded his constitutional privilege. If there is any equivocation about it, the record is no good. So that is the reason.

The Witness: I do not intend any equivocation, your Honor.

The Court: I didn't mean to suggest that you did. And I want to say, too, for the record that you have a perfect right to plead that constitutional privilege. That is my opinion.

Mr. Berman: Thank you very much, your Honor.

Mr. Caputo: Your Honor, just to wind up here, you stated earlier and you have just stated that you sustained

without equivocation Mr. Spevack's plea of privilege of self-incrimination for not producing the documents. But [fol. 72] at the same time I believe you stated earlier that, notwithstanding that plea, he has a duty to be candid and frank with this Court, and that perhaps his refusal to produce these documents may have some serious consequences by way, perhaps, of disciplinary action. I believe that that is what the Court said earlier.

The Court: I said that there was in process a test case in which that question will be argued and contested and determined.

Mr. Berman: There is a test case in the process?

Mr. Caputo: Yes.

Mr. Berman: I see.

The Witness: May I, your Honor, without the advice of counsel, having practiced before the Bar so many years, ask whether or not my matter may not stand suspended until the determination of what may be a test case? I have a great deal at stake here, your Honor.

The Court: Of course.

The Witness: I testified before the Bar Association in 1945, I have been practicing before the Bar, having been [fol. 73] admitted in 1926, and I question in my own mind whether or not I should be placed in the peril of having a determination made when, with all the diligent search that my counsel and I have made, and others have made, there has been no determination on that issue.

The Court: No, I think counsel's question is this: Whether or not this Inquiry intends to proceed in accordance with the theory of the so-called test case in his situation, and I think it is fair to say that we do not so intend. This test case is exactly what the words mean.

Mr. Berman: I understand.

The Court: And until the disposition of that, the final disposition of that, of course no other such proceedings will be brought. Isn't that fair?

Mr. Caputo: I think that is a fair statement, your Honor.

**The Court:** I think so.

**The Witness:** So that I may be clear in my befuddled mind, your Honor, would that mean that my matter here is not foreclosed by today's position?

**The Court:** Well, let's see if we can define it more clearly.

[fol. 74] **The Witness:** Well, it is just as if in a trial all sides rest.

**The Court:** Let's assume that the Appellate Division, when, as, and if it is confronted with the question, determines that the refusal to answer relevant and material questions at this Inquiry, relating to a man's practice, is indicative of such a lack of candor with the Court as to warrant disbarment. Let us assume that they so determine. If that should be the decision of the Appellate Division, of course you and everybody else would be given a full opportunity to come back here with your records and to testify. Isn't that right?

**Mr. Caputo:** Certainly, your Honor. I am quite certain that would be the procedure that would be followed.

**The Court:** Surely.

**Mr. Caputo:** We are not here to establish records for the purposes of disbarment, your Honor. We are here to find facts only.

**The Court:** You will be given every opportunity if that should be the determination.

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[fol. 75] Brooklyn, New York, Tuesday, September 5, 1961

**Before:**

Hon. Edward G. Baker, Justice.

[fol. 76] **Appearances:**

Denis M. Hurley, Esq., David T. Berman, Esq., representing Samuel Spevack.

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[fol. 77] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Do you have any particular date in mind?

Mr. Hurley: How busy is Mr. Spevack? We would like to suit your convenience.

Mr. Berman: Would it be possible to go beyond Yom Kippur, the end of the holiday week, or would that be too much of a request? That would be past September 20th and then perhaps to go to September 26th, if that is permissible. That would be for the purpose of avoiding the holidays.

Mr. Hurley: That would be agreeable to us, your Honor.

The Court: We will adjourn it to October 2nd at ten o'clock.

Mr. Hurley: I would like to raise a question, your Honor. I put in the letter to Mr. Berman, as I did with other attorneys, that today Mr. Spevack is expected to produce and deliver to the Inquiry for examination all his financial records as previously subpoenaed and that Mr. Spevack should be present in order to testify to the keeping and identity of such financial records.

Do I understand from one of my assistants that you and [fol. 78] your client intend to raise a question about delivering or turning over to the Inquiry for inspection the financial records?

Mr. Berman: Not per se any objection. It is just that some of the items in question do not exist and never existed. I thought at the right time we could explain what is available. When the conference is set we could then go over each item pursuant to the subpoena which was served and then indicate whatever is in existence and available.

The Court: I think you told me that the last time you were in. Some of the records called for in the subpoena were not in existence.

Mr. Berman: That is right, sir.

The Court: All we want are the records which he keeps.

Mr. Berman: There are about eleven or twelve items. At the proper time we thought we could discuss the matter



and then by referring to each particular item indicate whatever we have available. Perhaps there may even be an opportunity to eliminate some of the items if they are not relevant.

Mr. Hurley: Those that are available and that Mr. [fol. 79] Spevack has will be left for inspection with the Inquiry.

Mr. Berman: Do you want them all brought over? You cover a number of years.

Mr. Hurley: Mr. Berman, my thinking on this is that rather than our discussing them or you and I discussing the particular items with the Judge, wouldn't it simplify the matters, as we do in all cases, to have Mr. Spevack come in, take the stand and produce them, and we will then mark them for identification. Then he can explain the absence of any other records. We can go through the subpoena piecemeal with him.

Mr. Berman: At that time we can discuss each particular item you set forth in the subpoena.

Mr. Hurley: That is right.

Mr. Berman: If an occasion should arise that we suggest that some of the matters would not be relevant to his practice of law, would he then be able to mention it? Because this is pertaining to his business as an attorney. It refers to the following records: "Pertaining to your business as an attorney." That is one thing I would like to have [fol. 80] clarified.

Mr. Hurley: I would like to suggest to your Honor that that comes up at a later date, it seems to me. In other words, at this time we want such records that we called for and are available. Then we will have Mr. Spevack identify them, mark them for identification, and then they are turned over to us for examination. When we attempt before Judge Baker later to offer these records in evidence at the Judicial Inquiry, or at the Additional Special Term, then it seems to me is the time that the Judge will have to rule on the relevancy of the records or whether there is any privilege involved, and so forth.

Mr. Berman: First you rather we produce anything and everything we can that would comply and then later we may object to any specific item?

The Court: Of course.

Mr. Hurley: It has happened, as the Judge will bear out, on some occasions. We have asked for some records and gone through them and we may find nothing wrong and therefore we never offer them in evidence. If we do find anything that is improper or anything that proves a [fol. 81] point, then and only then we offer them in evidence.

Mr. Berman: We all know that the presumption of innocence pertains to anybody.

Mr. Hurley: Of course.

The Court: All right, October 2nd.

Brooklyn, New York, Monday, October 2, 1961.

Mr. Caputo: Your Honor, the first matter on the calendar today is in the matter of Samuel Spevack, an attorney who was served with a subpoena duces tecum and who is going to make an application today through his counsel, David T. Berman.

[fol. 83] Mr. Caputo: Would it be advisable at this time, your Honor, for Mr. Berman to state for the record what position, if any, Mr. Spevack will take on October 9th in connection with the production and surrender of possession of his records?

Mr. Berman: I would rather not, with your permission, because we have already discussed that when we came before your Honor. That was mentioned to some extent when Mr. Hurley was present and at that time something was indicated.

**The Court:** In any event, the books will be produced on that day.

**Mr. Berman:** Those which are in existence. That was mentioned before. Some of the items were never in existence, to begin with.

[fol. 84] **Mr. Caputo:** If your Honor please, I just want to know if on Monday, the 9th, Mr. Spevack will not only produce his records but will surrender custody of the records to the Judicial Inquiry and Judge Baker.

[fol. 85] **The Court:** I wonder if we are not unnecessarily complicating the matter. What we would like to know, if possible in advance, is whether or not any question will be raised about the right of the Inquiry to have custody of the records for the purpose of examining them.

Let me say this: We look at it from a practical viewpoint. We cannot possibly go over the records at the moment they are produced.

[fol. 87] **The Court:** For the present we are concerned with the production of the records on the adjourned date. They will be produced?

**Mr. Berman:** At that point that which can be produced will be produced.

[fol. 90] **Brooklyn, N. Y. Monday  
October 9, 1961.**

**Mr. Caputo:** This is in the matter of Samuel Spevack, your Honor. Mr. Berman, who represents Mr. Spevack, I believe has a statement to make for the record.

**STATEMENT BY MR. BERMAN, COUNSEL FOR MR. SPEVACK**

**Mr. David T. Berman:** In the nature of an application, may it please the Court. May it please your Honor, my

application has two subdivisions. The first is on behalf of Mr. Spevack. We most respectfully request an adjournment of the matter before the Court for three weeks.

Second, to relieve me from all further responsibility or [fol. 91] reference in connection with this matter.

Mr. Spevack has indicated he desires to have another attorney represent him. I am informed that one Bernard Shatzkin, of 235 East 43rd Street, Mnahattan, a member of the firm of Shatzkin & Cooper of that address will represent Mr. Spevack, or possibly the firm will represent him.

Mr. Shatzkin will personally handle the matter.

As of late Friday evening, after speaking to Mr. Spevack, it appeared that the proper steps to take as an officer of your court, on my own behalf, would be to indicate to the Court that I am to be replaced by Mr. Shatzkin, as distinguished from any other possible interpretation. I therefore so advise the Court.

[fol. 92]

#### COLLOQUY

The Court: Two weeks from today. Of course, your application to be relieved is granted.

[fol. 94]

Brooklyn, N. Y., Monday, October 23, 1961.

#### Appearances:

Bernard Shatzkin, Esq., Representing Samuel Spevack.

[fol. 97] The Court: How about the production of the records, counsel?

Mr. Shatzkin: If your Honor pleases, we intend to produce the records called for by the subpoena. We had made



all those arrangements on Friday. We intended producing them here this morning.

[fol. 98]

Brooklyn, New York  
Monday, December 4, 1961

Mr. Caputo: We have on this morning's calendar, your Honor, the matter of Samuel Spevack. Mr. Bernard Shatzkin is here for Mr. Spevack.

The purpose of the appearance today, your Honor, is to request of Mr. Spevack that he produce and surrender [fol. 99] custody of the financial books, records and documents called for in the subpoena served on him on June 2, 1958, issued by the Judicial Inquiry on June 2, 1958.

[fol. 105] The Court: It is a difficult thing to do, but I certainly don't want anybody to say that this Court has been unfair in any respect to anybody who has been asked to come here.

I will grant an adjournment, but it has got to be the last. The question is, to what date? When will you finally make up your mind whether or not the books are going to be produced?

Mr. Shatzkin: With respect to the date, by virtue of the circumstances that I have outlined, I respectfully request about the second week in January.

The Court: January 10th?

Mr. Shatzkin: That is satisfactory.

[fol. 106]

Brooklyn, N. Y. January 10, 1962.

Mr. Caputo: Your Honor, the next matter on is the matter of Samuel Spevack, who is scheduled to produce some financial records. He is here represented by his attorney, Bernard Shatzkin.

[fol. 110] The Court: . . . In other words, we have a subpoena now outstanding which has called for the production of certain books and records, and there are no charges pending against your client, of course.

[fol. 113] The Court: I don't know what I can do except to direct that those records be produced, counselor. I don't think I have any alternative.

Mr. Shatzkin: I appreciate your Honor's position in the matter, and I am grateful for the indulgence shown to me [fol. 114] and my client in the past. I am also appreciative of Mr. Hurley's position and Mr. Caputo's position, but I think I should apprise the Court of the fact at this time that in the event my application to wait until the Appellate Division makes its determination is denied, that my client has been advised by me that in my opinion he should assert his constitutional privileges in case we have to proceed to-day and refuse to—assert all of his constitutional privileges under the Constitution of the United States and under the Constitution of the State of New York.

The Court: I feel, counselor—I don't want to be unfair about this, but I feel I must take the position I have stated.

[fol. 115] Mr. Caputo: I would suggest to the Court, if you will, that Mr. Spevack assume the stand and state under oath what his position is at this time.

The Court: Do you want to discuss it further with Mr. Spevack before we proceed? I will be glad to give you that opportunity.

Mr. Shatzkin: Yes, your Honor.

(A brief recess was taken.)

Mr. Caputo: I believe I left off by requesting that the Court ask Mr. Spevack to take the stand and state under oath what his position is.

**SAMUEL SPEVACK, recalled.**

**Examination by Mr. Caputo:**

**Q.** Mr. Spevack, you were served with a subpoena in June of 1958 requesting you to produce certain financial records, is that correct?

**A.** Yes.

**Q.** In June of the year 1959, when you were sworn and took the stand, you were asked if you would produce the records called for by that subpoena, is that correct?

**Mr. Shatzkin:** That is objected to. The record speaks [fol. 116] for itself.

**The Court:** I will allow the question.

**A.** I don't recall precisely what I said, but what is in the record is right.

**Q.** At that time you refused to produce the records upon the ground that the contents thereof might tend to incriminate you and you invoked that constitutional privilege as the ground for refusing to produce your records.

**Mr. Shatzkin:** I don't know that this witness should be called upon to answer a question based upon Mr. Caputo's recollection of what he said at that time unless Mr. Caputo will read specifically or offer the witness the record to indicate exactly what he said.

**Mr. Caputo:** I want him to understand, your Honor, what his position was at that time so that in answering the questions that I will ask him a little later on he has sufficient background now to answer the present questions intelligently.

**The Court:** Why not just answer the questions which you want to propound now without reference to what has happened in the past? As counsel says, the record that we have, of course, will speak for itself.

[fol. 117] **Q.** Mr. Spevack, do you at this time wish to withdraw the privilege of self-incrimination which you invoked at a previous time before Mr. Justice Baker in con-

nection with the subpoena served on you, dated June 2, 1958?

A. I have conferred with my counsel, Mr. Shatzkin, at length, and he has advised me, after examining the law and relying upon his advice to me as a lawyer, and me as a client, I don't know that I can answer the question precisely as you asked it, but I restate, as best as I can, what my position is and I might say that I respectfully would be obliged not to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty, and further in that respect I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6 of the Constitution of the State of New York, and also the constitutional privilege accorded by both the Fifth Amendment and the 14th Amendment of the Constitution of the United States.

There is some other document that my counsel might offer me here so that my answer may be full and complete.

I also take the position, on the advice of counsel, under the 14th Amendment of the Constitution of the United [fol. 118] States, with respect to right of fundamental fairness, and claim that the subpoena duces tecum is far too broad under that interpretation in relation to fairness.

I also respectfully invoke my right to due process of law and the equal protection of the laws under the 14th Amendment of the Constitution of the United States.

Q. Mr. Spevack, I ask you at this time if you will, pursuant to the subpoena of June 2, 1958, produce the day book requested therein, just to speed the process, if your answer is the same, with permission of the Court, would you say the same?

A. Yes.

Q. Is your answer the same?

A. It is.

Q. Would you produce, pursuant to that subpoena, cash receipts book?



A. The answer is the same.

Q. Cash disbursements book?

A. The answer is the same.

Q. Check book stubs?

A. The answer is the same.

Q. Petty cash book?

A. The answer is the same.

[fol. 119] Q. Petty cash vouchers?

A. The answer is the same.

Q. General ledger and general journal?

A. The answer is the same.

Q. Canceled checks, bank statements, duplicate deposition slips of regular and checking accounts, open and closed?

A. The answer is the same.

Q. Passbooks and evidence of accounts other than checking accounts, with all depositories, such as savings banks, savings and loan associations, postal savings, credit unions, etc.?

A. The answer is the same.

Q. Record of all loans made from financial institutions and others, open and closed?

A. The answer is the same.

Q. Payroll records consisting of: (A) Payroll book, (B) Social Security and withholding tax returns?

A. The answer is the same.

Q. Copies of Federal and State income tax returns and accountant's work sheets relative thereto?

A. The answer is the same.

Q. Mr. Spevack, I will read to you from the opinion of [fol. 120] the matter of Cohen, decided by the Appellate Division, Second Department. The following language appears at 9 Appellate Division 2d, pages 448, 449: "To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this Court is not the fact that respondent has invoked his constitutional privilege against self-incrimination, but rather the fact that he has deliberately refused to cooperate with the Court in

its efforts to expose unethical practices and in its efforts to determine incidentally whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."

[fol. 123] Mr. Cohen was disbarred as a result of those decisions.

[fol. 124] COLLOQUY

The Court: It is true that Mr. Spevack, I think, on at least two occasions indicated his desire and willingness to [fol. 125] appear before the Inquiry, and to testify.

Mr. Caputo: Yes, sir. If your Honor please—

The Court: What is the purpose of submitting the letters or marking them in evidence? There is no dispute on the point.

Mr. Caputo: If your Honor please, the purpose is this: The quotations from the Albert Martin Cohen decisions in the Appellate Division, the Court of Appeals and in the U. S. Supreme Court are for this purpose: We will urge, the Judicial Inquiry will urge to the Appellate Division that your failure at this point to produce the records called for by the June 1958 subpoena, subpoena duces tecum, is the kind of lack of cooperation within the meaning of the Albert Martin Cohen decision, and that therefore the same—possibly the same serious consequences may flow from your present position as they did in the case of Albert Martin Cohen.

The Court: I still don't see the relevancy of the fact that he indicated a willingness at some past time, some prior occasion, to produce the records upon the question we are confronted with now.

Mr. Caputo: I believe, your Honor, that that shows [fol. 126] lack of cooperation.

The Court: He has availed himself today of his privilege against self-incrimination.

Mr. Caputo: But those letters would indicate that he is making some position known to the Court, which is inconsistent with his present position, and I contend—

The Court: Which is inconsistent with a position which he took in the past, is that right?

Mr. Caputo: These letters also indicate that he was going to withdraw his privilege of self-incrimination.

The Court: Yes.

Mr. Caputo: And I say that is lack of cooperation.

Mr. Shatzkin: I respectfully suggest with regard to that, that these letters speak for themselves, and that Mr. Caputo does not properly place his own interpretation upon them at this time. The letters speak for themselves.

The Court: Frankly, I am not sure of the relevancy of them, but I can't see that Mr. Spevack will be prejudiced in any way by their being received in evidence. There is [fol. 127] no question that they are his letters. Whether they have a bearing on this particular thing, I am not prepared to say. I will allow them.

I think you wanted to ask Mr. Spevack if that was his letter?

Mr. Caputo: Yes. If we can get some concession here, it may not be necessary to ask him.

Mr. Shatzkin: May I see it again, please?

Mr. Caputo: Surely. The only concession I would like is that the letter of June 29, 1961, was sent by Mr. Spevack to Judge Baker, and that Judge Baker received it, and that the annexed note-typed letter was also annexed to the letter and was sent by Mr. Berman, who was Mr. Spevack's attorney at the time, and that both were received by Judge Baker.

Mr. Shatzkin: I desire to cooperate in simplifying these proceedings, but I don't want Mr. Spevack placed in the position that it may ever be urged that he opened the door by answering any questions. By virtue of those circum-

he has deliberately refused to cooperate with the Court in

stances, unless I receive some assurance by Mr. Caputo to that effect, I think I must advise Mr. Spevack to give a [fol. 128] similar answer to this question that he gave to those other series of questions.

[fol. 132] Mr. Caputo: Mr. Spevack, I mentioned earlier what the position of the Judicial Inquiry will be in connection with your present position of refusing to produce the records called for by the June 2, 1958 subpoena. You have invoked your privilege against self-incrimination. In view of the statements that I have made, the quotations from the opinions in the Albert Martin Cohen case, the references that I have made to the Canons of Ethics, and to the [fol. 133] New York State Penal Law, do you still maintain the position that you took earlier?

A. I must respectfully do so on the advice of my counsel.

Mr. Caputo: I don't believe I have anything further, your Honor.

Mr. Shatzkin: May I make a short statement?

The Court: Surely.

Mr. Shatzkin: So that there will be no misunderstanding as to precisely what Mr. Spevack's claim is with respect to privilege, I quote from the U. S. Supreme Court decision in Cohen, referred to by Mr. Caputo, wherein the Court stated that Mr. Cohen relied solely upon "the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article 1, Section 6 of the New York State Constitution."

I direct attention to the fact that Mr. Spevack does not rely solely upon that, that Mr. Spevack, in addition to relying upon that relies specifically on the matters which he set forth in his claim of privilege and specifically relies on the 14th Amendment, and that he does claim a Federal privilege not to testify, very specifically under the 14th [fol. 134] Amendment and not merely, in the words of the U. S. Supreme Court, majority opinion where they stated in Cohen, "We take the petitioner's position and the



remittitur of the Court of Appeals as presenting under the 14th Amendment only a broad claim of fundamental unfairness."

We not only claim that, but we claim specifically a privilege not to testify under the 14th Amendment of the Federal Constitution.

Mr. Spevack also claims for himself all of those privileges which Chief Justice Warren, Mr. Justice Brennan, Mr. Justice Douglas, and Mr. Justice Black said that an attorney would have the right to claim.

That is all I have to say with respect to that.

Mr. Caputo: Just in closing, I wonder if I may make a statement that the position of the Judicial Inquiry in connection with what its future action will be as a result of Mr. Spevack's present position—do you understand that, Mr. Shatzkin?

Mr. Shatzkin: No.

Mr. Caputo: Then I will repeat it. I think it is worthwhile repeating. The Judicial Inquiry will urge to the Appellate Division that Mr. Spevack's refusal based upon [fol. 135] the privilege of self-incrimination to produce the records called for by the June 1958 subpoena is a lack of cooperation within the meaning of the Albert Martin Cohen case, and that we would urge to the Appellate Division that such lack of cooperation requires disciplinary action just as it required disciplinary action in the Albert Martin Cohen case, and, as you know, Mr. Cohen was disbarred.

That is the position that the Judicial Inquiry will urge to the Appellate Division.

I would just like to know if you understand our position?

Mr. Shatzkin: Yes, I do.

Q. Mr. Spevack, do you understand our position?

A. Yes.

Mr. Caputo: That is all.

(Witness excused.)

[fol. 139] Brooklyn, New York,  
July 9, 1962—Monday.

(Bernard Shatzkin, Esq., appeared as counsel for Samuel Spevack.)

SAMUEL SPEVACK, having been recalled, resumed the [fol. 140] witness stand, and continued his testimony as follows:

Mr. Shatzkin: Being that we do not have copies of the minutes of the previous hearing, Mr. Caputo has shown to me what he points out to be the relevant pages of the assertion by Mr. Spevack of his constitutional privileges at the last hearing held sometime in January—

Mr. Caputo: That is correct.

Mr. Shatzkin: —of 1962. The only purpose of my statement at this time is to make sure that Mr. Spevack has either asserted, on his own behalf, all of the protective assertions necessary to protect him completely with respect to his constitutional privileges, in the event that they have not all been stated, or for the sake of adequately covering that situation I would like to state very briefly, in summary, that there is asserted here on Mr. Spevack's behalf—

Mr. Caputo: May I interrupt for a minute, Mr. Shatzkin? The last time that Mr. Spevack asserted his constitutional privileges it was in response to questions that I had put to him concerning the production of sub-[fol. 141] poenaed documents under the subpoena served upon him by the Judicial Inquiry in June of 1958. Would your Honor think it best for me to simply again ask Mr. Spevack if he will produce those records, have him say that he does not produce them for the reasons previously asserted, and for the additional reasons which he is not putting on the record? Do you think perhaps that would be a better procedure, your Honor?

The Court: Well, I haven't reviewed the record, but isn't the present record clear enough on the point? I think

it is perfectly proper we do it in the way you suggest. Do you have any objections?

Mr. Shatzkin: Yes, I just would like to avoid the repetition. I think it was done adequately at one time but I simply want to make certain that it is clear in here, and one of the reasons for my apprehension is the fact that the United States Supreme Court in the Cohen case, the majority at least, said that while Cohen had asserted one position before the Inquiry, he had not stayed with that position with respect to claiming constitutional privilege. For instance, I am addressing myself specifically to the [fol. 142] 14th Amendment, where the majority said, and I am quoting now from footnote number 1, of Mr. Justice Harlan's opinion, and I am quoting:

" \* \* \* He relied solely upon the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article 1, Section 6 of the N. Y. State Constitution."

Then they go on to say:

" \* \* \* Court of Appeals as presenting under the 14th Amendment only a broad claim of fundamental unfairness."

Our position is that we don't want to be left in that position, and we are now asserting the 14th Amendment, with specificity, to use the language of the minority, not only with respect to the broad general intention of the 14th Amendment but the majority claims Cohen only availed himself of, and we also want to add an assertion of our constitutional rights under the 4th Amendment of the Constitution. Is that correct, Mr. Spevack?

Mr. Spevack: That is so.

Mr. Shatzkin: Rather than you repeating all of that, you want this record to be considered as though you said [fol. 143] what I just said?

Mr. Spevack: That is the fact.

The Court: I think that covers it.

Mr. Caputo: Well, let's see—

The Court: May I see the minutes—unless you need them.

Mr. Caputo: Beginning here, your Honor, is Mr. Spevack's statement of constitutional privileges.

(Mr. Caputo handed to the Court.)

The Court: I think it is broad enough. It seems to me it is perfectly clear what Mr. Spevack's position is.

Mr. Caputo: So that I may have it clear in my own mind, the situation as it exists now is this: when I asked Mr. Spevack in January of this year to produce the records pursuant to the subpoena of June 1958, which was served upon Mr. Spevack, he refused to produce the records and gave as the ground for his refusal the statement of various constitutional privileges which appear in the record. As I understand it now, he continues to refuse to produce those records asserting, of course, the same constitutional privileges he asserted then, but in addition thereto he [fol. 144] further asserts the constitutional privilege against unreasonable searches and seizures, as it is found in the 4th Amendment to the United States Constitution, is that correct, Mr. Spevack?

Mr. Spevack: That is correct. Incidentally, I also assert the privilege guaranteed under Article 1, Section 12 of the N. Y. State Constitution, which in effect is a general release statement of the 4th Amendment of the United States Constitution—

Mr. Caputo: Article 1, Section 12?

Mr. Spevack: Yes.

Mr. Caputo: Of the N. Y. State Constitution?

Mr. Spevack: Yes.

Mr. Caputo: And that is the unreasonable searches and seizures provisions of the N. Y. State Constitution, is that correct?

Mr. Spevack: That is so.

several occasions and I have more specifically respectfully



Mr. Caputo: And you are invoking that as well?

Mr. Spevack: Yes.

Mr. Caputo: I think the record is clear, your Honor.

The Court: It seems clear to me.

(End of Petitioner's Exhibit 2.)

[fol. 148] Mr. Klein: The letter annexed on the letterhead of Samuel Spevack, attorney at law, is dated July 6, 1961, also addressed to Hon. Edward G. Baker, and reads as follows:

"Sir:

"In view of the recent decision by the Supreme Court of the United States in the Cohen matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before Your Honor, during the course of the Judicial Inquiry, which I then asserted in good faith, upon the advice of counsel, and in the sincere belief that I then had the right to so do.

"I am willing to testify and answer questions concerning relevant matters.

"Respectfully yours, (signed) Samuel Spevack."

[fol. 150] Mr. Klein: Referring to what is now Petitioner's Exhibit 5, it is a letter on the letterhead of the Supreme Court of the State of New York, Justices' Chambers, Brooklyn, N. Y., Edward G. Baker, Justice, dated July 26, 1961, addressed to Samuel Spevack, Esq., 66 Court Street, Brooklyn 1, New York.

"Dear Mr. Spevack:

"This will acknowledge your letter of July 6, 1961, in which you withdraw the plea of privilege asserted at the time of your appearance at the Judicial Inquiry.

"Since the members of the Inquiry staff are now engaged in other matters requiring their full attention, I am unable at this time to fix a specific date for your return. I shall do [fol. 151] so at the earliest possible opportunity, and notify Mr. Berman, so that a date convenient to all may be arranged.

"Very truly yours, (signed) E. G. Baker."

[fol. 164] (After recess.)

(The proceedings were continued.)

Mr. Klein: If it please the Court, I would like to re-open the case of the petitioner for the purpose of calling the respondent to the witness stand.

I call upon Mr. Spevack to take the witness stand.

SAMUEL SPEVACK, respondent, residing at 135 Eastern Parkway, Brooklyn, New York, called as a witness by the petitioner, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. Mr. Spevack, you are the respondent in this proceeding?

A. Yes.

Q. When were you admitted to the bar, Mr. Spevack?

A. In March of 1926.

Q. And after your admission did you then engage in the practice of law?

A. I respectfully refuse to answer any questions other than that which I have already answered, first reiterating [fol. 165] the constitutional privileges guaranteed by the United States Constitution and by the Constitution of the State of New York which I have heretofore asserted on several occasions, and I now more specifically respectfully

refuse to answer the question on the ground that my answer might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty. I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6, of the Constitution of the State of New York and the Fifth Amendment and the 14th Amendment of the Constitution of the United States. I respectfully invoke my right to due process of law and the equal protection of the laws under the 14th Amendment of the Constitution of the United States.

Q. Do I understand it, Mr. Spevack, that any question I intend to put to you you would give the same answer that you have just given?

A. That is so.

The Referee: Mr. Spevack, are you aware of the serious consequences that might flow from a refusal to cooperate with the Court in its efforts to expose unethical practices in its efforts to determine if you have committed any acts of [fol. 166] professional misconduct?

The Witness: I am aware of the position I am taking, sir, and—but I respectfully submit that the question asked of me might be subject to different interpretations.

Q. May I ask you, Mr. Spevack, Are you aware that the position you have taken may result in disbarment?

A. I am fully aware of the obligations and of the possible penalties that may be imposed.

Q. All right.

Cross examination.

By Mr. Shatzkin:

Q. Are you also aware, Mr. Spevack, that the position you have taken may result in the dismissal of these charges?

A. I certainly am.

The Referee: All right. Is that the petitioner's case?

Mr. Klein: That's the petitioner's case.

The Referee: Thank you.

The Witness: Thank you, sir.

The Referee: Mr. Shatzkin.

Mr. Shatzkin: The respondent respectfully moves to dismiss the specifications—respectfully moves to dismiss the [fol. 167] entire petition and the specifications concerning which proof has been offered by the petitioner on the grounds that the allegations contained therein and the proof offered do not constitute the legal basis for disciplinary action.

We respectfully urge that respondent's refusal to answer the questions and to produce the books and records alleged in the petition in reliance on his privilege against self-incrimination was made in the past in good faith and is being made today in good faith and was and is properly based upon the provisions of the Constitution of the United States and the Constitution of the State of New York and the amendments thereof and cannot lawfully constitute a basis for disciplinary action. Such action would violate respondent's right to invoke the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6, of the Constitution of the State of New York and the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States and would also violate respondent's right to due process of law and the equal protection of the laws under the Fourteenth Amendment of [fol. 168] the Constitution of the United States.

Although the case of *Cohen v. Hurley*, 366 U.S. 117 held that an attorney at law is not entitled to the protection of the Fifth Amendment of the Constitution of the United States, when he is called upon to testify in a judicial inquiry concerning his activities as a lawyer, nevertheless, that case was decided upon the authority of *Twining v. New Jersey*, 211 U.S. 77, wherein it was held that the Fifth Amendment of the United States Constitution does not apply to the states.

The attention of this tribunal is respectfully invited to the fact that during its current term the Supreme Court of



the United States indicated that they are prepared to reconsider Twining's rule that the Fifth Amendment privilege against self-incrimination does not apply to the states, and for that purpose the Supreme Court granted the petition for certiorari in *Mally v. Hogan*, 150 Conn. 520, 187 A. 2d 745; certiorari was granted and argued in the United States Supreme Court on March 5, 1964, bearing calendar number 110.

[fol. 180]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

In the Matter of SAMUEL SPEVACK, Attorney,

SOLOMON A. KLEIN, Esq., Petitioner,

SAMUEL SPEVACK, Attorney-Respondent.

REPORT OF REFEREE—October 21, 1964

To the Appellate Division:

By this Court's order of September 23, 1963 the issues raised by the July 8, 1963 petition of Solomon A. Klein (hereinafter called "petitioner"), in respect to Samuel Spevack (hereinafter called "respondent"), and the September 5, 1963 answer of respondent were referred to me for hearing and for a report setting forth my findings.

The hearing was held on June 2, 1964. Extensive briefs were thereafter filed. The final answering brief was filed on October 7, 1964.

### The Petition

The petition alleges, and the answer admits, that respondent was admitted to practice before this Court in March, 1926, and that, at the times mentioned in the petition, he practiced law in Kings County (pet., paras. 3, 4; ans., para. 2).

The petition further alleges, and the answer likewise admits, that, during the course of the Judicial Inquiry initiated by this Court's order of January 21, 1957, respondent, in response to a subpoena duces tecum dated June 2, 1958, appeared before the Additional Special Term (Arkwright, J.) on June 12, 1958, and that, at respondent's request, he was granted several adjournments to June 26, 1959 when he again appeared before the Additional Special Term (Baker, J.) (pet., paras. 2, 5; ans., para. 2).

The petition goes on to allege that, on June 26, 1959, [fol. 181] respondent refused to produce any records enumerated in the aforesaid subpoena upon the ground that their production might tend to incriminate or degrade him or subject him to some penalty or forfeiture (pet., para. 6); that thereafter, on or about June 26, 1961, respondent requested that he be permitted to appear before the Additional Special Term to testify and to produce the records (pet., para. 7); that, pursuant to this request, respondent appeared on January 10, 1962 before the Additional Special Term (pet., para. 8); that respondent again refused to answer any questions and to produce the records, claiming his Constitutional privilege against self-incrimination (pet., para. 8); that respondent was apprised that failure to answer might give rise to disciplinary action (pet., para. 8); that, on July 9, 1962, respondent appeared as a witness before the Additional Special Term and likewise refused to produce his records upon the ground of self-incrimination and upon the additional ground that to require production would violate the Fourth Amendment and Article I, Section 12 of the New York Constitution (pet., para. 9).

The answer does not dispute that the aforesaid events occurred generally as alleged by the petition but begs leave to refer to the official minutes for respondent's exact refusals and offers (ans., paras. 3, 4, 5, 6).\*

[fol. 182] The petition alleges, and the answer denies (ans., para. 7) that respondent has been guilty of professional misconduct and conduct prejudicial to the administration of justice as follows:

*para. 10 (A):* The refusal of the respondent SAMUEL SPEVACK to produce the records set forth in the subpoena duces tecum alleged in paragraph "5." above and his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry

\* The answer sets up the following affirmative defense:

"Respondent's refusal to answer the questions and to produce the books and records alleged in the Petition herein in reliance on his privilege against self-incrimination, was made in good faith and was properly based upon the provisions of the Constitution of the United States and the Constitution of the State of New York, and the amendments thereof, and cannot lawfully constitute a basis for disciplinary action. Such action would violate Respondent's rights to invoke the constitutional privilege against self-incrimination, as guaranteed by Article 1, Section 6 of the Constitution of the State of New York, and the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States, and would also violate Respondent's right to due process of law and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States."

that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.

*para. 10 (B)*: That in addition to and wholly apart from respondent's repeated refusal to testify and to produce his financial records, the said respondent SAMUEL SPEVACK wilfully and contumaciously obstructed and impeded the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his deliberate failure to appear on various adjourned dates and by authorizing and instructing counsel appearing on behalf of respondent at the Additional Special Term to make and give statements, representations and information to the Court, which statements, representations and information were untrue, whereby both the Court and counsel for respondent SAMUEL SPEVACK were deceived.

At the outset of the hearing before me (S.M. 8), petitioner stated he was limiting his proof to the aforesaid charges alleged in paragraphs 10 (A) and 10 (B) of the petition. Petitioner stated he would offer no evidence as to numerous charges alleged in other paragraphs of the petition, to wit: 10 (C) (failure to file statements regarding retainers), 10 (D) (filing false statements of retainer), 10 (E) (commingling clients' monies), 10 (F) (failure to keep records), 10 (G) (failure to submit closing statements), 10 (H) (preparation of false bills of particulars), 10 (I) (division of fees with attorneys who did not perform legal services), and 10 (J) (representing conflicting interests). All these other charges had been denied by the answer (ans., para. 7).

#### The Hearing Before Me

The hearing before me was brief. Petitioner offered in [fol. 183] evidence, without objection by respondent, the



transcript of the proceedings before the Additional Special Term of the Supreme Court, Kings County with respect to the inquiry into respondent's conduct, and various documents referred to in that transcript (Pet.'s Exh. 2 - 11; S.M. 8-9; S.M. 145-160).

Petitioner also offered in evidence, again without objection by respondent, more than one thousand statements of retainer filed by respondent with the Appellate Division from 1953 through the first six months of 1960 (S.M. 3-7; Pet.'s Exh. 1). Respondent conceded he was engaged to a substantial extent in the practice of personal injury and property damage cases on a contingent fee basis (S.M. 6).

When petitioner called respondent to testify in the hearing before me, respondent acknowledged he was the respondent in the proceeding and that he was admitted to the bar in 1926 (S.M. 164). However, upon being asked whether after his admission he engaged in the practice of law, respondent stated:

"I respectfully refuse to answer any questions other than that which I have already answered, first reiterating the constitutional privileges guaranteed by the United States Constitution and by the Constitution of the State of New York which I have heretofore asserted on several occasions, and I now more specifically respectfully refuse to answer the question on the ground that my answer might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty. I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6, of the Constitution of the State of New York and the Fifth Amendment and the 14th Amendment of the Constitution of the United States. I respectfully invoke my right to due process of law and the equal protection of the laws under the 14th Amendment of the Constitution of the United States." (S.M. 164-165).

Respondent testified he would give the above answer to any question petitioner intended to put (S.M. 165).

Although respondent thus refused to testify before me as well as before the Inquiry, I do not construe the petition as raising any question that this refusal constituted some further or additional misconduct by respondent. Petitioner did not seek to amend the petition to add any further charge based on respondent's actions at the hearing before me nor did petitioner make any offer of proof as to what questions he desired to ask respondent at the hearing before me. Accordingly, I am directing my attention to respondent's conduct before the Inquiry, not his conduct before me.

[fol. 184] Respondent offered no evidence at the hearing before me (S.M. 166). He did move to dismiss the petition on the ground that the allegations therein and the proof offered did not constitute a legal basis for disciplinary action (S.M. 166-167). I denied this motion (S.M. 178). In so denying I did not presume to pass on the substantive issue of the sufficiency of the petition and the proof herein in the light of various constitutional arguments raised by respondent. I was merely taking the view that, as a matter of procedure, the constitutional issues are for the Appellate Division and not me to decide.

#### The Charge of Wilfully and Contumaciously Obstructing and Impeding the Additional Special Term

It will be convenient to first discuss this charge which is alleged in paragraph 10 (B) of the petition and involves—as I see it—primarily questions of fact. As will hereafter appear, the charge alleged in paragraph 10 (A) poses a legal question with constitutional ramifications which, as I construe the order of reference, is for the Appellate Division and not me to decide.

The petition alleges (para. 10 (B)):

“That in addition to and wholly apart from respondent's repeated refusal to testify and to produce his financial records, the said respondent SAMUEL SPEVACK wilfully and contumaciously obstructed and impeded

the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his deliberate failure to appear on various adjourned dates and by authorizing and instructing counsel appearing on behalf of respondent at the Additional Special Term to make and give statements, representations and information to the Court, which statements, representations and information were untrue, whereby both the Court and counsel for respondent SAMUEL SPEVACK were deceived."

The charge alleged in paragraph 10 (B), as I read it, is a charge of professional misconduct which raises no constitutional issue. As framed by petitioner, the charge in paragraph 10 (B) does not at all involve respondent's refusals to testify or produce his records. It asserts that, "in addition to *and wholly apart from* respondent's repeated refusal to testify and to produce his financial records" (emphasis supplied), respondent "wilfully and contumaciously obstructed and impeded the Additional Special Term".

[fol. 185] This wilful and contumacious obstructing and impeding by respondent is alleged by paragraph 10 (B) to have consisted of (1) "a course of conduct deliberately calculated to delay and mislead" the Additional Special Term; (2) "deliberate failure to appear on various adjourned dates"; and (3) "authorizing and instructing" his counsel to make and give untrue statements, representations and information, whereby both the Court and respondent's counsel were deceived. The aforesaid conduct, "wholly apart from" respondent's refusal to testify and produce records, is claimed by petitioner to have occurred and to have constituted wilful and contumacious obstructing and impeding of the Additional Special Term.

And the allegations of paragraph 10 (B) not proved by a fair preponderance of the evidence. To demonstrate this failure of proof it is necessary to trace in considerable detail the proceedings before the Judicial Inquiry.



The first hearing occurred on June 12, 1958 after the subpoena of June 2, 1958 was issued for the production of respondent's financial records relative to his business as an attorney (S.M. 9; Pet.'s Exh. 11). Respondent appeared personally and stated he had not had an opportunity to decide what position he would take (S.M. 13, 17-18). The Court, *without objection by counsel for the Inquiry*, gave respondent until June 17th to decide (S.M. 18-19).

On June 17, 1958 respondent and his attorney, David T. Berman, Esq., appeared (S.M. 19). Mr. Berman stated he was originally called into the matter on June 15th and requested an adjournment until June 24, 1958 (S.M. 19-20). *Counsel for the inquiry stated he had no objection* (S.M. 21). Mr. Berman said he "hope[d] to be able" on June 24th to give a statement as to respondent's position but the adjournment was not conditioned on that being done (S.M. 21-22).

At the hearing on June 24, 1958 Mr. Berman appeared and stated he had an application pending before the Appellate Division for relief against the subpoena (S.M. 22). At Mr. Berman's request, and *on the statement of counsel [fol. 186] for the Inquiry that he had "no objection" and "would go along with an adjournment without date"* to await a decision of the Appellate Division, the matter was adjourned without date. (S.M. 23-24).

The next hearing, which did not directly involve respondent, occurred on November 14, 1958 and related to a subpoena duces tecum served on a bank for the records of respondent's accounts (S.M. 25, 32). The bank's attorney requested an adjournment, and an adjournment was granted to December 1st (S.M. 25-26, 29). Respondent's attorney, Mr. Berman, asked that the return of the bank subpoena be adjourned a week to give him an opportunity to seek an order vacating it (S.M. 33-34). The Court gave him the week, *without objection from counsel for the Inquiry* (S.M. 35-36).

On December 2, 1958 the return date of the bank subpoena was adjourned without date, *at the request of counsel*



for the Inquiry, until a decision was forthcoming from the Appellate Division on a motion made by Mr. Berman to vacate the bank subpoena (S.M. 36-37).

The next hearing took place over six months later, on June 15, 1959, with both respondent and Mr. Berman present (S.M. 37-38). At that hearing counsel for the Inquiry pointed out that respondent's motion to vacate the subpoena covering his records had been denied by the Appellate Division on July 21, 1958; that on October 20, 1958 the Appellate Division had denied reargument, leave to appeal, and a stay; that the Court of Appeals had denied leave to appeal on January 15, 1959; and that the United States Supreme Court had denied certiorari on June 1, 1959 (S.M. 37-38).

So far as appears, no attempt was made by the Inquiry to compel compliance with the subpoena for respondent's records while these various appeals were in process. This was consistent with the attitude, above referred to, taken by the Additional Special Term at the June 24, 1958 hearing when it adjourned the matter "without date" pending a determination of respondent's motion for relief against the subpoena.

It seems evident from the foregoing that, at least up to June 15, 1959, respondent had done nothing which could be regarded as wilful and contumacious obstructing or impeding of the Inquiry. Respondent or his counsel had appeared at every hearing. Respondent had employed recognized legal procedures to test the validity of the subpoenas directed to him and to the bank. There is nothing in the record from which I can reasonably conclude that his tests were sham or frivolous. Indeed, the fact that the Additional Special Term, with no objection by counsel for the Inquiry, adjourned respondent's matter "without date" pending a decision on the challenge to the subpoena for his records, and that, so far as appears, there was no attempt by the Inquiry to enforce the subpoena while respondent was exhausting his remedies all the way to the United States

Supreme Court, suggests that respondent's motion to vacate raised bona fide issues.

At the June 15th, 1959 hearing respondent's counsel, Mr. Berman, requested a brief adjournment (S.M. 40-45). He stated at that time that, if respondent took the stand, "constitutional privileges or rights or protection may be invoked" (S.M. 44). *Counsel for the Inquiry agreed to an adjournment to June 19, 1959, although with reluctance* (S.M. 45-46).

Respondent appeared personally on June 19, 1959 but Mr. Berman did not because of his wife's illness (S.M. 46). *Apparently by agreement between Mr. Berman and counsel for the Inquiry* the matter was put over to June 26, 1959 (S.M. 46-47).

On June 26, 1959 respondent and Mr. Berman appeared (S.M. 47). Mr. Berman stated his contention that the motion to vacate the subpoena had been denied on the ground of prematurity (S.M. 48-49). He asked an adjournment until determination of any appeal from a denial by the Court of a motion to vacate a subpoena in another case (S.M. 49-50). The Court denied this application (S.M. 50).

Respondent was then questioned by counsel for the Inquiry (S.M. 52). Respondent's counsel conceded that the equivalent of service of the subpoena had been made on respondent (S.M. 53). On advice of counsel respondent declined, however, to produce the subpoenaed records on the ground that "production may tend to incriminate or degrade me or to subject me to some penalty or forfeiture" [fol. 188] (S.M. 59-61, 69). The Court commented that respondent had "a perfect right" to plead this constitutional privilege (S.M. 71).

At this point the Court, sua sponte, advised respondent that the Inquiry was preparing a test case based upon the refusal of a witness to answer questions on constitutional grounds, and that it was "the thought in some quarters that such an attitude . . . might be indicative of such a lack of candor . . . as to warrant disciplinary proceedings based upon that ground alone" (S.M. 61-62). The Court also

stated, and counsel for the Inquiry agreed, that, if the "test case" resulted in a determination by the Appellate Division that the refusal to answer questions warranted disbarment, respondent "would be given a full opportunity to come back here with your records and to testify" (S.M. 73-75). Respondent's counsel then asked if respondent was "excused from further appearance", and the Court said "Yes" (S.M. 75).

So far as appears, nothing more occurred in respondent's case for over two years. The *Cohen* case—the "test case" referred to at the June 26, 1959 hearing—was decided by the United States Supreme Court on April 24, 1961 (S.M. 102). *Cohen v. Hurley*, 366 U.S. 117, 6 L. Ed. 2d 156 (1961). The Supreme Court in the *Cohen* case held, five to four, that New York's disbarment of an attorney who invoked his state privilege against self-incrimination in the course of the Inquiry did not violate the Fourteenth Amendment. Following the decision in the *Cohen* case, respondent, under date of June 29, 1961, wrote to Justice Baker of the Additional Special Term asking whether the Justice would consider an application for permission to appear (Pet.'s Exh. 3; S.M. 145-146). Under date of July 6, 1961 respondent's attorney, Mr. Berman, forwarded to Justice Baker another letter from respondent, dated July 6, 1961, wherein respondent said: "In view of the recent decision by the Supreme Court of the United States in the *Cohen* matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before Your Honor . . . . I am willing to testify and answer questions concerning relevant matters" (Pet.'s Exh. 4; S.M. 146-148).

[fol. 189] Under date of July 26, 1961 Justice Baker wrote to respondent, stating "Since the members of the Inquiry staff are now engaged in other matters requiring their full attention, I am unable at this time to fix a specific date for your return. I shall do so at the earliest possible opportunity, and notify Mr. Berman, so that a date convenient to all may be arranged" (Pet.'s Exh. 5, S.M. 149-151).

Under date of August 28, 1961 counsel for the Inquiry notified Mr. Berman that Justice Baker had set respon-



dent's matter on a call calendar for September 5, 1961, and that "At that time, a definite date will be fixed for a hearing" (Pet.'s Exh. 6, S.M. 151-152). Counsel for the Inquiry further stated: "On September 5th, [respondent] is expected to produce and deliver to the Inquiry for examination all of his financial records as previously subpoenaed. [Respondent] should be present in order to testify to the keeping and identity of such financial records" (Pet.'s Exh. 6, S.M. 152).

It appears, therefore, that, up to this point at least, respondent had not been guilty of wilfully and contumaciously obstructing and impeding the Inquiry. He had resisted the subpoena directed to his records, and, so far as appears, the Inquiry had voluntarily refrained from pursuing the matter while respondent's resistance was litigated up to the United States Supreme Court. Then, when the subpoena was upheld, respondent had asserted his constitutional privilege against turning over the records. There is no claim in the petition and no evidence before me from which I can conclude that this assertion of the privilege was a sham or a pretense or that the privilege was invoked more extensively than reasonably required to protect respondent against incrimination. Indeed, as previously noted, the Additional Special Term commented that respondent had "a perfect right" to plead the privilege (S.M. 71).

Respondent had been advised by the Court, after he asserted the privilege, that the Inquiry was preparing a "test case" on the question whether refusal to answer questions would be indicative of a lack of candor warranting disbarment, and he had been told by the Court, with the con-[fol. 190] currence of counsel for the Inquiry, that he would be given a "full opportunity" to come back with his records and testify if the "test case" resulted in a determination adverse to his position (S.M. 61-62, 73-75). The Court had stated that there was "a very serious question to be determined in connection with" the test case (S.M. 62). In the meantime it had "excused" respondent "from further appearance" (S.M. 75).



When the test case—i.e., the *Cohen* case—was decided adverse to respondent's position, respondent was given the opportunity he had been promised to come back and testify. If respondent had availed himself of that opportunity, turned over his records, and testified, presumably no one would have claimed that his prior actions constituted professional misconduct.

It seems, therefore, that the claim in paragraph 10 (B) that respondent, "wholly apart from" his refusal to testify and produce his records, wilfully and contumaciously obstructed and impeded the Inquiry must be sustained—if at all—on what respondent did *after* he was given the promised further opportunity to produce his records subsequent to the decision in the *Cohen* test case. It is my opinion that his subsequent actions do not sustain the charge in paragraph 10 (B).

September 5, 1961, it will be recalled, was the date initially set by the Inquiry for respondent's further opportunity to produce his records. On that date respondent's attorney, Mr. Berman, appeared and requested an adjournment on the ground that respondent was unable to attend by virtue of other court engagements (S.M. 76-77; Pet.'s Exh. 7; S.M. 152-155). Counsel for the Inquiry stated he would like to suit respondent's convenience, and, *on the agreement of counsel for the Inquiry*, the matter was adjourned to October 2, 1961 (S.M. 77). After the adjournment was granted, counsel for the Inquiry asked whether respondent intended to raise a question about turning over the financial records (S.M. 77-78). Mr. Berman replied "Not per se any objection. It is just that some of the items in question do not exist and never existed" (S.M. 77-78). [fol. 191] Under date of September 27, 1961 counsel for the Inquiry advised Mr. Berman that it would be necessary for respondent to be present on October 2nd with his financial records in order that they might be properly identified (Pet.'s Exh. 8; S.M. 156).

On October 2, 1961 Mr. Berman appeared without respondent and requested a one week adjournment on the

ground that October 2nd was a holy day of the Hebrew faith which respondent observed (S.M. 81-82). Mr. Berman stated he was empowered to say that *counsel for the Inquiry had no objection to the adjournment*, and the Court granted it (S.M. 82-83). After the adjournment had been granted, counsel for the Inquiry asked the Court if it would be advisable for Mr. Berman to state what position, if any, respondent would take on the adjourned date in connection with the records (S.M. 83). Mr. Berman replied that the books would be produced (S.M. 83). He specifically noted, however, that he could not "commit an individual to give up rights, whether they are under the Constitution or under the Statute" (S.M. 89).

On October 9, 1961 Mr. Berman appeared, apparently without respondent (S.M. 90). He asked the Court to relieve him from all further responsibility in the matter (S.M. 90-91). He stated that he was to be replaced by Bernard Shatzkin, Esq., and requested an adjournment for three weeks so that Mr. Shatzkin could adequately advise respondent (S.M. 90-91). Counsel for the Inquiry objected to an adjournment for that period but *agreed to an adjournment* until October 23rd (S.M. 92).

Under date of October 9, 1961 counsel for the Inquiry advised Mr. Shatzkin by letter that he was "requested" to appear, along with respondent, on October 23rd, and that respondent "must have with him the records, books and documents called for by the subpoena" (S.M. 157-158).

On October 23, 1961 Mr. Shatzkin, respondent's new counsel, appeared (S.M. 94). Respondent did not. Mr. Shatzkin requested a month's adjournment on the basis that, because of the press of other matters, he had not had the opportunity to acquaint himself with some of the background of the case (S.M. 95-96). Counsel for the Inquiry opposed an adjournment for this length of time and suggested that [fol. 192] "no more than a few days be given" (S.M. 96). In response to the Court's inquiry, Mr. Shatzkin stated "we intend to produce the records called for by the subpoena" (S.M. 97). The Court thereupon adjourned the matter un-

til December 4th, commenting that "*I don't see that we will be prejudiced in any way by granting the application counsel makes for an adjournment*" (S.M. 98) (emphasis supplied).

On December 4, 1961 Mr. Shatzkin appeared; respondent did not (S.M. 98). Counsel for the inquiry alluded to the failure of respondent to appear personally but did not make any particular point of the matter (S.M. 102-103). It should be noted in this connection that, although petitioner asserts, in paragraph 10 (B) of the petition, that respondent's allegedly wilful and contumacious obstructing and impeding of the Inquiry consisted in part of "deliberate failure to appear on various adjourned dates", this December 4th instance appears to be the only occasion in the course of the many hearings where counsel for the Inquiry made the point that respondent had appeared by counsel rather than personally. The Court never admonished respondent or his counsel because of respondent's failures to appear personally, never warned respondent or his counsel that such conduct might be deemed contumacious, and never made any direction that respondent attend all hearings personally. Under such circumstances I fail to see how a charge of professional misconduct can be spelled out of the failure of respondent to appear in person at hearings. Respondent or his counsel, or both, appeared at every scheduled hearing, so far as the record shows, and the failure of respondent to personally attend each hearing never seems to have been regarded as significant by the Additional Special Term.

At the December 4, 1961 hearing Mr. Shatzkin informed the Court that, since the October 23rd hearing, he had been practically incessantly engaged in bus negotiations with the Transport Workers Union and the City (S.M. 99). He requested an adjournment for approximately a month (S.M. 101). Counsel for the Inquiry "strongly" opposed the adjournment (S.M. 101). The Court asked Mr. Shatzkin whether it wouldn't be fair to state whether or not respondent intended to comply with the subpoena (S.M.

103). Mr. Shatzkin replied: " \* \* \* This is not a matter that is easy of determination. \* \* \* [respondent's] position as to what he was going to do and what he will do has changed now a dozen times, and a great many of the changes have been predicated on the very difficulty that this whole question has posed apparently not only for this Court and the Appellate Division, but also for the Court of Appeals and the United States Supreme Court \* \* \* " (S.M. 103-104).

Mr. Shatzkin urged that "we not be obliged to take a position at this time" (S.M. 105). The Court then ruled it would grant an adjournment to January 10, 1962 "but it has got to be the last" (S.M. 105-106). The Court informed Mr. Shatzkin that on January 10th he "*must make a decision one way or the other*" (S.M. 106; emphasis supplied).

Under date of January 4, 1962 counsel for the Inquiry advised Mr. Shatzkin by letter that at the January 10th hearing respondent "must have with him the records, books and documents called for by the subpoena" (S.M. 158-159). He also quoted in that letter the colloquy at the December 4, 1961 hearing wherein, as above noted, the Court had stated that the January 10th adjournment "has got to be the last one" and that on that day respondent "must make a decision one way or the other" (S.M. 159-160).

On January 10, 1962 respondent and Mr. Shatzkin appeared (S.M. 106). Mr. Shatzkin informed the Court that respondent had applied for an order to obtain access to those disciplinary proceedings in the past five years where the charges were not sustained (S.M. 106-110). Mr. Shatzkin requested that respondent's matter be put over until such time as the Appellate Division passed on this application (S.M. 110). The Court indicated its unwillingness to do so (S.M. 110-113) whereupon Mr. Shatzkin stated: " \* \* \* I think I should apprise the Court of the fact at this time that in the event my application to wait until the Appellate Division makes its determination is denied, that



my client has been advised by me that in my opinion he should assert his constitutional privileges \* \* \* (S.M. 114).

[fol. 194] Respondent was then called to testify. He answered "Yes" when asked by counsel for the Inquiry if he had been served with a subpoena in June of 1958 for certain financial records (S.M. 115). He was next asked whether he wished to withdraw the privilege of self-incrimination which he had previously invoked, and, upon advice of counsel, replied:

" \* \* \* I respectfully would be obliged not to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me or subject me to a forfeiture or a penalty, \* \* \* I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6 of the Constitution of the State of New York, and also the constitutional privilege accorded by both the Fifth Amendment and the 14th Amendment of the Constitution of the United States" (S.M. 117).

Respondent went on to state that he also took a position, on the advice of counsel, under the Fourteenth Amendment with respect to fundamental fairness and claimed the subpoena was far too broad in relation to fairness (S.M. 117-118). He also invoked due process of law and the equal protection of the law under the Fourteenth Amendment (S.M. 118). He indicated his answer would be the same with respect to requests to produce specific records named in the subpoena (S.M. 118-119).

On June 27, 1962 Mr. Shatzkin was granted an adjournment until July 9, 1962 *over the objection of counsel for the Inquiry* (S.M. 138-139).

At the final hearing before the Inquiry, on July 9, 1962, respondent added to the constitutional privileges previously asserted the privilege against unreasonable searches and seizures in the Fourth Amendment to the United States

Constitution and the similar privilege afforded by Article 1, Section 12 of the New York Constitution (S.M. 139, 143-144).

After making a careful examination of the aforesaid proceedings before the Additional Special Term, I am constrained to conclude it would be speculation, conjecture, and surmise to infer—as petitioner alleges in paragraph 10 (B) of the petition—that respondent “wilfully and contumaciously obstructed and impeded the Additional Special Term” by “a course of conduct deliberately calculated to delay and mislead” the Additional Special Term, by “deliberate failure to appear on various adjourned dates”, and “by authorizing and instructing” his counsel to make and give untrue statements, representations and information to the Court, whereby both the Court and respondent’s [fol. 195] counsel were deceived.

I have already pointed out that the delay in the proceedings before the Additional Special Term from the first hearing in June, 1958 until the hearing in June, 1959, at which respondent first invoked his self-incrimination privilege, was countenanced by the Court and by counsel for the Inquiry and was due, in the main, to the fact that a challenge to the subpoena for respondent’s records was being litigated in the courts. Everyone concerned seems to have been content to let the matter lie dormant while that challenge, which all seem to have treated as bona fide, was decided.

Similarly, the delay from the hearing in June, 1959 to the hearing in September, 1961, after the decision in the *Cohen* test case, seems to have been likewise countenanced by the Court and by counsel for the Inquiry. The Court, on its own motion, had told respondent that there was a “very serious question to be determined”—to wit, whether a lawyer could be disciplined for lack of candor on the basis of invoking his constitutional privilege; that the Inquiry was, therefore, preparing a “test case”; that, if the decision in the test case proved adverse to respondent’s position, he would be given a “full opportunity” to come back with his

records and testify; and that, in the meantime, he was "excused from further appearance" (S.M. 61-62, 73-75).

It seems apparent that the Additional Special Term and counsel for the Inquiry believed that a very serious constitutional issue was presented, and that, therefore, it was not fair to compel respondent to make up his mind whether to testify or not until the test case had been decided. Respondent did not maneuver or mislead the Additional Special Term into taking this position. The Additional Special Term did so on its own, with the concurrence of counsel for the Inquiry (S.M. 61-62, 73-75).

Nor do I find that respondent's actions subsequent to the decision in the *Cohen* case amounted, as paragraph 10 (B) of the petition alleges, to a wilful and contumacious obstructing and impeding of the Additional Special Term by a course of conduct deliberately calculated to delay and mislead it or by a deliberate failure to appear or by authorizing or instructing his counsel to make or give untrue statements, representations or information to the Court.

As heretofore pointed out, the claim of obstructing and impeding in paragraph 10 (B) of the petition based on deliberate failure of respondent to appear at hearings is not supported by the evidence. Respondent or his attorney appeared at every hearing and no one ever made any substantial point of the failure of respondent to personally appear at each hearing.

The further claims in paragraph 10 (B) of the petition that respondent obstructed and impeded the Additional Special Term by "a course of conduct deliberately calculated to delay and mislead" and by "authorizing and instructing his counsel to make and give untrue statements, representations and information to the Court" are also unsupported by the preponderance of the evidence.

As heretofore shown, nothing done by respondent prior to the decision in the *Cohen* case supports these claims which, bear in mind, are not at all premised on respondent's refusal to testify and produce records but on conduct



"wholly apart from" such refusal. I also find nothing in respondent's conduct subsequent to the decision in the *Cohen* case to sustain these claims.

It is true that respondent, under date of July 6, 1961, after the *Cohen* decision had come down, informed Justice Baker that he "wished" to withdraw his constitutional privilege and was "willing" to testify (Pet.'s Exh. 4; S.M. 146-148). It is also true that, six months later, on January 10, 1962, respondent, on the advice of counsel, asserted the privilege again and refused to testify (S.M. 117-119).

If respondent did so in a deliberate effort to delay or mislead the Additional Special Term, it would certainly have been unprofessional conduct. However, I do not believe the preponderance of the evidence points to a conclusion that respondent was guilty of such deliberate delay or misleading.

Respondent, after the *Cohen* case, was unquestionably placed in a difficult position. That case, on first reading at least, seemed to mean that respondent had to produce his records or face professional discipline, including the [fol. 197] possibility of disbarment. Presumably this was the interpretation put on the *Cohen* case in June and July of 1961 by respondent and his then counsel, Mr. Berman, and accordingly they determined it was best for respondent to produce his records. Thereafter, however, respondent obtained new counsel, Mr. Shatzkin, and Mr. Shatzkin advised respondent to continue to assert his privilege. Mr. Shatzkin was, and is, evidently of the opinion that the *Cohen* case did not, and does not, leave respondent with the alternative of production of records or professional discipline. Indeed, Mr. Shatzkin submitted a 77 page brief to me wherein he argues, in effect, that the *Cohen* case is no longer good law in view of the fact that the Supreme Court, in flat contradiction of its holding in *Cohen*, has now decided that the Fifth Amendment applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 278 U.S. 1, 12 L. Ed. 2d 653 (1964).

As is well known, the meaning from time to time attached by the United States Supreme Court to the scope and ex-



tent of constitutional rights has been subject to great fluctuation in recent years. When the nation's highest tribunal so frequently divides five to four on such matters, as it did in the *Cohen* and *Malloy* cases, lawyers may be pardoned when they too disagree as to the effect of a holding by that bench.

I cannot read respondent's heart, anymore than any fact finder can. Unquestionably there is a *possibility* that, at the time, in July of 1961, when respondent told Justice Baker he wished to withdraw his constitutional privilege, he was doing so with the fraudulent intention of not carrying through on the withdrawal. There is nothing in the record, however, to *prove* that respondent then had this fraudulent intention except for the fact that respondent did not thereafter withdraw the privilege.

A mere failure to carry out a commitment is, of course, insufficient evidence that one had a fraudulent intention to dishonor the commitment when he made it. If such a failure were adequate evidence of fraud, every breach of contract would be automatically a tortious deceit. Petitioner here, like any plaintiff, had the burden of proof. I find petitioner [fol. 198] failed to sustain the burden of showing that respondent never intended to carry through on the statement made to Justice Baker in the letter of July 6, 1961.

It should be noted, moreover, that the Court and counsel for the Inquiry seem, in fact, not to have been misled or prejudiced—at least not substantially so—by respondent's statement to Justice Baker in July, 1961 indicating he wished to withdraw the privilege or by the subsequent statements of respondent's counsels to like effect. Thus, in the very first hearing after respondent's letter to Justice Baker, to wit, the hearing of September 5, 1961, counsel for the Inquiry asked whether respondent intended to raise a question about turning over the records (S.M. 77-78). Although respondent's counsel, Mr. Berman, replied—doubtless in entire good faith—that there would not "per se" be any objection (S.M. 77-78), counsel for the Inquiry did not take this assurance at face value. Thus, at the next hearing on October 2, 1961, counsel for the Inquiry

again asked what position respondent would take (S.M. 83). Although Mr. Berman, in reply, reiterated that the books would be produced, he added that he could not "commit" respondent to give up his rights "whether they are under the Constitution or under the Statute" (S.M. 83, 89).

It is apparent, therefore, that counsel for the Inquiry never treated respondent's letter of July 5, 1961 as a firm assurance that the records would be produced and was on notice as early as October 2, 1961 that respondent's then counsel, Mr. Berman, was not committing respondent to give up his Constitutional rights.

It is true that Mr. Shatzkin, respondent's new counsel, stated on October 23rd—the first hearing Mr. Shatzkin attended—that "we intend to produce the records called for by the subpoena" (S.M. 97). This was in response to an inquiry by the Court (S.M. 97). Mr. Shatzkin made clear, however, that he had not at that time fully acquainted himself with the case (S.M. 95-96), and, at the next hearing—that of December 4, 1961—Mr. Shatzkin urged that "we not be obliged to take a position [on producing the records] at this time" because "This is not a matter that is easy of [fol. 199] determination" (S.M. 103-105). The Court recognized Mr. Shatzkin's problem. It agreed that "It [to-wit, taking a position] is a difficult thing to do" and accordingly granted a "last" adjournment to January 10, 1962 on which day it stated Mr. Shatzkin would have to "make a decision one way or the other" (S.M. 105-106). On January 10th, of course, respondent did make a decision and reasserted his privilege (S.M. 117).

My conclusion as to what probably happened between July 6, 1961, when respondent indicated he wished to withdraw his privilege and January 10, 1962 when he reasserted it, is that respondent was wavering in his own mind as to what he ought to do; that Mr. Berman and, later, Mr. Shatzkin were likewise uncertain; that this wavering and uncertainty accounts for the conflicting statements to the Court; that the statements to the Court were not deliberately falsified; and that counsel for the Inquiry was not in reality misled because such counsel always recognized that

respondent might not carry through on his July 6th statement about withdrawing the privilege. I find no proof by a preponderance of the evidence that respondent acted in bad faith, that he deliberately tried to delay or mislead the Additional Special Term, or that he authorized or instructed either of his counsels to make or give untrue statements, representations or information to the Court.

Accordingly, I find the charge in paragraph 10 (B) of the petition—which, I reiterate, claims professional misconduct “wholly apart from” respondent’s refusal to testify and produce his financial records—not proved.

### The Charge of Violating Respondent’s Inherent Duty to the Legal Profession

The petition alleges (para. 10 (A)):

“The refusal of the respondent SAMUEL SPEVACK to produce the records set forth in the subpoena duces tecum alleged in paragraph ‘5.’ above and his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent’s knowledge relating to his conduct [fol. 200] and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.”

This is the same charge involved in *Cohen v. Hurley*, 366 U.S. 117, 6 L. Ed. 2d 156 (1961). The language of the charge

is virtually the same as that in the *Cohen* case. See 366 U.S. at 121-122, 6 L. Ed. 2d at 160-161.

In considering this charge I am confronted at the outset by a question raised by petitioner as to the scope of the reference. According to petitioner, the affirmative defense raised by respondent, namely that his refusal under claim of constitutional privilege to answer questions and produce his records "cannot lawfully constitute a basis for disciplinary action" (ans., para. 9), is not before me. Petitioner asserts (his reply br., pp. 1-2) that "the only point upon which a finding of fact is to be made" by me is whether respondent refused to testify and produce his records, and that the "legal effect" of that refusal "is for the Appellate Division" to decide.

Respondent, on the other hand, has argued the constitutional issues before me at great length. It is respondent's basic position, as I understand it, that the *Cohen* case is no longer good law in view of the fact that the Supreme Court has since repudiated the premise of the majority opinion in *Cohen* that the Fifth Amendment did not apply to the states and that hence the states had great leeway in defining the reach of the privilege against self-incrimination, and the further premise of the majority opinion that a lawyer's only federal constitutional right, so far as self-incrimination in a Judicial Inquiry was concerned, was a right granted by the Fourteenth Amendment to be protected against "fundamental unfairness". According to respondent, since *Malloy v. Hogan*, 278 U.S. 1, 12 L. Ed. 2d 653 (1964) has made clear that the Fifth Amendment does not apply to the states, the views of the four dissenters in *Cohen*—which views were premised on the applicability of the Fifth Amendment—are now the law of the land.

I am constrained to agree with petitioner that these constitutional issues are for the Appellate Division and not me to decide. My duty under the reference, so far as the charge in paragraph 10 (A) of the petition is concerned, is only to find what respondent did with respect to refusing to testify and produce records and not the legal effect of such refusal. I do not, therefore, pass on the



question whether respondent's refusal to testify and produce his records violated his inherent duty and obligation as a member of the legal profession, as alleged in paragraph 10 (A) of the petition. That question is inextricably bound up with the constitutional issues raised by respondent's affirmative defense, and resolution of those issues is not within my province.

All that is before me, then, is the question of fact whether respondent did refuse to testify and produce records under claim of constitutional privilege. The admissions in the answer and the uncontradicted evidence make it clear that he did do so. Indeed, there is no real dispute between the parties on the point.

Accordingly, I find, as matters of fact, that respondent, at the hearing before the Inquiry of June 26, 1959, refused to produce the subpoenaed records on the ground that such production might tend to incriminate or degrade him or to subject him to some penalty or forfeiture (S.M. 59-61, 69). I also find that, at the Inquiry hearing of January 10, 1962, respondent refused to produce such records or answer any questions in relation thereto, citing the privilege against self-incrimination accorded by Article 1, Section 6 of the Constitution of New York and the Fifth and Fourteenth Amendments of the United States Constitution; he then also claimed that the subpoena was so broad as to violate the Fourteenth Amendment's guarantee of fundamental fairness and invoked his right to due process of law and equal protection under the Fourteenth Amendment (S.M. 117-119).

I further find that, at the Inquiry hearing of July 9, 1962 respondent added to the constitutional privileges previously asserted the privilege against unreasonable searches and seizures afforded by the Fourth Amendment to the United States Constitution and the similar privilege afforded by Article 1, Section 12 of the New York Constitution (S.M. 139, 143-144). Finally, I find that at the hearing before me respondent refused on constitutional grounds to answer any questions other than that he was the respondent and was admitted to the bar in 1926

(S.M. 164-165). At such hearing he reiterated the constitutional privileges previously asserted, and specifically claimed the privilege against self-incrimination as guaranteed by Article 1, Section 6 of the New York Constitution and the Fifth and Fourteenth Amendments of the United States Constitution; he also invoked his right to due process and equal protection under the Fourteenth Amendment (S.M. 164-165).

This report is respectfully submitted, together with the exhibits and the transcript of testimony.

Harold F. McNiece, Referee.

Dated: Brooklyn, N. Y., October 21, 1964.

[fol. 203] [File endorsement omitted]

[fol. 204]

In the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

Present: Hon. Marcus G. Christ, Acting Presiding Justice, Arthur D. Brennan, L. Barron Hill, James D. Hopkins, A. David Benjamin, Justices.

In the Matter of SAMUEL SPEVACK, an Attorney.

SOLOMON A. KLEIN, Petitioner,

SAMUEL SPEVACK, Respondent.

ORDER OF DISBARMENT—July 19, 1965

A proceeding having been instituted in this court upon the petition of Solomon A. Klein, verified the 8th day of July, 1963, in respect to Samuel Spevack, an attorney and counselor at law admitted in this department on March 3,

1926, petitioning for an order directing that the respondent Samuel Spevack, as an attorney and counselor at law, be disciplined upon the charges set forth in said petition, and why such other or further action upon the charges embodied in said petition, as justice may require, should not be had, and for such other and further relief as may be just and proper, and the respondent having filed an answer, and this court by order dated September 23, 1963 having referred the issues raised by the petition and the answer to Harold F. McNiece, Esq., as referee, for hearing and for a report setting forth his findings upon the issues, and the Referee, after holding an extensive hearing at which testimony was taken, having filed his report dated October 21, 1964 with this court on said date, together with the testimony and exhibits, and the petitioner having moved to confirm the Referee's report and for the imposition of an appropriate measure of discipline upon the respondent, by notice of motion, dated April 29, 1965.

Now on reading and filing said notice of motion, petition, answer, affidavit of Solomon A. Klein and memorandum of petitioner in support of motion to confirm report, affidavit of Bernard Shatzkin and memoranda of respondent in opposition to petitioner's motion, the report of the [fol. 205] Referee the testimony and exhibits, and all the papers filed herein, and the said motion having been submitted by Mr. Solomon A. Klein, petitioner appearing in person and submitted by Messrs. Shatzkin and Cooper of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered that the petitioner's motion to confirm the Referee's report be and the same hereby is granted; and it is further

Ordered that the report of the Referee and the Referee's findings be and the same hereby are confirmed; and it is further

Ordered that on the basis of the Referee's unchallenged finding that respondent refused to testify and to produce his records the respondent Samuel Spevack be and he hereby is disbarred from practice as an attorney and counselor at law effective October 1, 1965; and it is further

Ordered that the name of Samuel Spevack be and the same hereby is struck from the roll of attorneys and counselors at law in the State of New York effective October 1, 1965; and it is further

Ordered that the said Samuel Spevack be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, and he is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law of its application or any advice in relation thereto effective October 1, 1965.

Enter: Joe J. Callahan, Clerk.

[fol. 206]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

OPINION—July 19, 1965

No. 1209

In the Matter of SAMUEL SPEVACK, an attorney,

SOLOMON A. KLEIN, petitioner,

SAMUEL SPEVACK, respondent.

This is a proceeding to discipline respondent, an attorney at law, for professional misconduct. The issues of fact were referred to a Referee for a hearing and for a report



setting forth his findings upon the issues. The Referee, after holding an extensive hearing, has filed his report setting forth findings which are partly in favor of the respondent and partly adverse to him. The petitioner now moves to confirm the Referee's report and for the imposition of an appropriate measure of discipline upon respondent.

While originally ten charges were made against respondent, only one survives for our consideration; further reference to this one surviving charge will be made below. As to eight of the charges, the petitioner offered no proof and has in effect abandoned them. As to the ninth charge, the Referee found that petitioner had failed to sustain the burden of proof and that respondent was not guilty.

The remaining tenth charge—the sole charge now in issue—is that respondent refused to honor a subpoena duces tecum duly served upon him, in that he had refused to produce his financial records and had refused to testify before the justice presiding at said Judicial Inquiry; and that such refusal constituted a breach of his inherent duty as an attorney and counselor at law to divulge to the court all pertinent information bearing upon his character and fitness and upon his conduct and practices as a lawyer. The learned Referee has found, and the respondent does not deny that, while at times he may have wavered in his refusal, his refusal finally became intransigent and absolute. [fol. 207] Respondent's sole defense is that his refusal was based on the ground that the production of his records and his testimony would tend to incriminate him; that he was entitled to rely on the relevant state and federal constitutional provisions protecting him against self-incrimination; and that as a matter of law such reliance on the constitutional provisions cannot be made the basis of any disciplinary action by this court.

Our view, as previously stated, is that a lawyer, like any other citizen, has an absolute right to invoke his constitutional privilege against self-incrimination and to refuse to supply the pertinent information; but that when a lawyer does so he fails in his inherent duty to the court to divulge all pertinent information necessary to show his

character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar (*Matter of Cohen v. Hurley*, 9 A D 2d 436, *affd.* 7 N Y 2d 488, *affd.* 366 U. S. 117, rehearing denied 374 U. S. 857, 379 U. S. 870). As we stated in *Cohen* (pp. 448-449):

"To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to cooperate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

In our opinion, the doctrine which we enunciated in *Cohen* has been in no way undermined or impaired by any contrary holding in the subsequent case of *Malloy v. Hogan* (378 U. S. 1), as urged by respondent. In that case, the petitioner had been held in contempt and imprisoned in consequence of his refusal to answer questions on the ground that his testimony would tend to incriminate him. But the petitioner there was not a member of the bar and, of course, his right to retain his membership in the bar, despite his refusal, was in no way involved.

[fol. 208] Under the circumstances, this court has no alternative other than to disbar the respondent. If he elects to invoke his constitutional privilege against self incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar. To that doctrine this court must adhere.

Accordingly, the petitioner's motion to confirm the Referee's report is granted; the Referee's findings are confirmed; and, on the basis of his unchallenged finding that

respondent refused to testify and to produce his records, the respondent is disbarred and his name directed to be struck from the roll of attorneys and counselors at law in the State of New York, effective October 1, 1965.

Christ, Acting P.J., Brennan, Hill, Hopkins and Benjamin, JJ., concur.

[fol. 209]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE MATTER OF SAMUEL SPEVACK,  
an Attorney, Appellant.

SOLOMON A. KLEIN, Respondent.

MEMORANDUM ORDER—Decided December 1, 1965

Order affirmed on the authority of *Cohen v. Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U. S. 582; *Shapiro v. United States*, 335 U. S. 1).

Concur: Chief Judge Desmond and Judges Dye, Van Voorhis, Burke, Scileppi and Bergan. Judge Fuld concurs in the following memorandum: Although I still adhere to the views I expressed in dissent in *Matter of Cohen (Hurley)* (7 N Y 2d 488, affd. *sub nom. Cohen v. Hurley*, 366 U. S. 117), I deem myself concluded by that decision and, accordingly, concur for affirmance. (But cf. *Malloy v. Hogan*, 378 U. S. 1.)

[fol. 210] Triple Certificate to foregoing paper (omitted in printing.)



[fol. 211]

No. 459

## COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of December in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

REMITTITUR—December 1, 1965

[fol. 212]

2.

No. 459.

65

IN THE MATTER OF SAMUEL SPEVACK, an Attorney.

SOLOMON A. KLEIN, Respondent,

SAMUEL SPEVACK, Appellant.

Be it Remembered, That on the 3rd day of November in the year of our Lord one thousand nine hundred and sixty-five, Samuel Spevack, the appellant—in this cause, came here unto the Court of Appeals, by Shatzkin & Cooper, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Solomon A. Klein, the respondent—in said cause, afterwards appeared in said Court of Appeals pro se.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Raymond J. Cannon, Clerk.

(Seal)



[fol. 213] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Bernard Shatzkin, of counsel for the appellant, and by Mr. Solomon A. Klein, pro se, for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed on the authority of *Cohen v. Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U. S. 582; *Shapiro v. United States*, 335 U. S. 1).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law. [fol. 214] Therefore, it is considered that the said order be affirmed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals  
of the State of New York.  
Court of Appeals, Clerk's Office,  
Albany, December 1, 1965.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

(Seal)

[fol. 215] In the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

Present, Hon. Marcus G. Christ, Acting Presiding Justice, Hon. Arthur D. Brennan, Hon. L. Barron Hill, Hon. James D. Hopkins, Hon. A. David Benjamin, *Justices*.

In the Matter of

SAMUEL SPEVACK, an attorney.

SOLOMON A. KLEIN, Respondent,

SAMUEL SPEVACK, Appellant.

ORDER ON REMITTITUR FROM COURT OF APPEALS—  
December 7, 1965

The above named Samuel Spevack, appellant in this proceeding having appealed to the Court of Appeals of the State of New York, from an order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of said court on July 19, 1965, disbarring Samuel Spevack from practice as an attorney and counselor at law and directing that his name be struck from the roll of attorneys.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed on the authority of *Cohen v. Hurley* (366 U.S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U.S. 582; *Shapiro v. United States*, 335 U.S. 1) and having further ordered that the record and proceedings be remitted to the Appellate Division of the

Supreme Court, Second Judicial Department, there to be proceeded upon according to law, and

Now on reading and filing the remittitur from the Court of Appeals of the State of New York, dated December 1, 1965, it is

Ordered that the order of the Court of Appeals of the State of New York, be and the same hereby is made the order of this Court.

Marcus G. Christ, Acting Presiding Justice.

[fol. 216] In the Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany.

Present, Hon. Charles S. Desmond, *Chief Judge, presiding.*

2 Mo. No. 27

**In the Matter of**

**SAMUEL SPEVACK, an Attorney,**

**SOLOMON A. KLEIN, Respondent,**

**SAMUEL SPEVACK, Appellant.**

**ORDER AMENDING REMITTITUR—January 6, 1966**

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended

that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights.

And the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball, Deputy Clerk.

(Seal)

[fol. 217]

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SUPREME COURT OF THE UNITED STATES

No. 944—October Term, 1965

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SAMUEL SPEVACK, Petitioner,

v.

SOLOMON A. KLEIN.

---

ORDER ALLOWING CERTIORARI—March 21, 1966

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~94~~ 62

SAMUEL SPEVACK, *Petitioner,*

*v.*

SOLOMON A. KLEIN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF NEW  
YORK.

LAWRENCE J. LATTO

WILLIAM H. DEMPSEY, JR.

MARTIN J. FLYNN

734 Fifteenth Street, N.W.

Washington, D.C. 20005

*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATZKIN

235 East 42nd Street

New York 17, New York

SHERA & GARDNER

734 Fifteenth Street, N.W.

Washington, D.C. 20005

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1965**

**No.**

**SAMUEL SPEVACK, *Petitioner,***

**v.**

**SOLOMON A. KLEIN, *Respondent.***

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF NEW  
YORK.**

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled action on December 1, 1965.

**Opinions Below**

The order and memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, are unreported and are printed as Appendices A and B hereto. The memorandum order of the Court of Appeals and the amended remittitur of that court are unreported and are printed as Appendices C and D hereto.

(1)



### **Jurisdiction**

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The judgment of the Court of Appeals was rendered on December 1, 1965, and, on December 13, 1965, Mr. Justice Harlan entered a stay of the order of the Appellate Division conditioned upon the filing of a petition for certiorari on or before January 24, 1966.

### **Questions Presented**

1. Whether the disbarment of an attorney solely because of his refusal, based upon a good faith claim of the privilege against self-incrimination, to testify and to produce records before a State Judicial Inquiry is in violation of the self-incrimination clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment.

2. Whether, assuming the Fifth Amendment standard does not of itself preclude the disbarment of an attorney under such circumstances, the disbarment is nonetheless a deprivation of due process of law or equal protection of the laws under the Fourteenth Amendment.

### **Statutes Involved**

This petition involves the Fifth and Fourteenth Amendments to the United States Constitution and Special Rule V of the Supreme Court of New York, Appellate Division, Second Department, all of which are printed in pertinent part as Appendix E hereto.

### **Statement of the Case**

In January 1957 the Appellate Division of the Supreme Court of New York, Second Department, ordered a Judicial Inquiry into alleged unethical practices among segments of the Kings County Bar. See *Anonymous v. Baker*, 360

U.S. 287. For a number of years the Second Department has had special rules regulating the conduct of attorneys who practice in personal injury, property damage and certain other types of actions under contingent fee arrangements. Among other things, the rules require the filing by such attorneys of statements of retainer setting forth the details of such arrangements and the preservation for a five year period of "the pleadings, records and other papers pertaining to such action . . . , and also all data and memoranda of the disposition thereof . . . [App. E]."

Petitioner has been a practicing attorney in Kings County since 1926, and he has filed numerous statements of retainer as required by the rules. On June 2, 1958, a subpoena issued calling for petitioner to testify and to produce records before the Judicial Inquiry. Petitioner's motion to quash the subpoena was denied, *Anonymous v. Arkwright*, 7 App. Div. 2d 874, *leave for appeal denied*, 5 N.Y. 2d 710, *cert. denied*, 359 U.S. 1009, and he appeared before the Judicial Inquiry and was sworn as a witness (R. 52).<sup>1</sup> However, he refused to testify or to produce the records on the ground that this might tend to incriminate him (R. 70). The Presiding Justice, after stating his "opinion" that petitioner had "a perfect right to plead that constitutional privilege," called attention to the pendency of a "test case" presenting similar issues and informed petitioner that no further proceedings would be held in his case until the final disposition of that test case (R. 71-75).

The test case, *Cohen v. Hurley*, 366 U.S. 117, was decided by this Court in April, 1961. In July, 1961, petitioner wrote

<sup>1</sup> "R" citations refer to the transcript of hearing on June 2, 1964 before Hon. Harold McNiece, Referee, to whom the Appellate Division referred the issues raised by the petition and answer in the disciplinary proceeding involved in this case. The transcript of the proceedings in the Judicial Inquiry is printed as an exhibit at pages 9-144 of the transcript of the June 2, 1964 hearing.

the Presiding Justice of the Judicial Inquiry that, in view of the decision in the *Cohen* case, he wished to withdraw his claim of privilege (R. 102). Shortly thereafter he retained new counsel, and, after further adjournments of the hearing, he appeared before the Judicial Inquiry and was asked if he did wish to withdraw his claim of privilege, as indicated in his letter. Petitioner replied that, upon the advice of his new counsel, he continued to claim his privilege against self incrimination under the Fifth and Fourteenth Amendments, and also under Article 1, Section 6 of the Constitution of the State of New York. He also stated his reliance upon the standard of fundamental fairness under the due process clause of the Fourteenth Amendment and upon the equal protection clause of that Amendment (R. 115-18).

In response to questions by the attorney for the Judicial Inquiry as to the specific documents included in the subpoena (R. 118-19 printed as App. F), petitioner persisted in his decision "not to produce any of the records or to answer any questions in relation thereto [R. 117]." Subsequently, he asserted his rights also under the Fourth Amendment's prohibition against unreasonable searches and seizures (R. 143-44). Respondent, by direction of the Judicial Inquiry, then filed a petition seeking disciplinary action against him.

The petition filed by respondent stated that this petitioner had been guilty of misconduct in ten separate respects. Eight of the charges were allegations that he had failed to comply with certain court rules relating to filing of retainer statements, that he had filed false statements and pleadings, that he had commingled clients' funds with his own and that he had violated the canons of ethics. The ninth charge was that petitioner, apart from his refusal to testify or to produce records, had obstructed the Inquiry by obtaining repeated postponements and making or caus-



ing to be made false representations; and the tenth charge was that petitioner was guilty of misconduct in that "his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of [petitioner] as a member of the legal profession . . . [Petition of Solomon A. Klein to Appellate Division 4]." The petition and answer were referred to a referee for hearing, at which hearing respondent announced that he was abandoning all charges in the petition other than the ninth and tenth charges. Petitioner was again called to testify, and he again refused to answer questions under a specific claim of all the federal constitutional provisions upon which he had relied in the Judicial Inquiry (R. 164-65).

In his report, the referee found that respondent had not proven the allegations in the ninth charge. Among his specific findings were that the evidence offered no basis for a conclusion that petitioner's claim of privilege "was invoked more extensively than reasonably required to protect [petitioner] against incrimination" and that the Inquiry was neither prejudiced nor misled by petitioner's July 1961 letter indicating his intention to withdraw his claim of privilege (Ref. Rept. 10, 19-20). As to the tenth charge, the referee found that petitioner did refuse to testify and to produce records under constitutional privileges based upon the Fourth, Fifth, and Fourteenth Amendments and upon relevant state constitutional provisions. He made no finding as to whether petitioner's refusal to testify and to produce records was in violation of his duties as an attorney, since that question was "inextricably bound up with the constitutional issues raised by [petitioner's] affirmative defense, and resolution of those issues is not within my province [Ref. Rept. 22]."

Respondent moved in the Appellate Division for con-



firmation of the referee's report and for the imposition of discipline against petitioner, and the Appellate Division entered a judgment disbaring petitioner. Finding the sole issue to be petitioner's refusal to testify and produce records before the Inquiry, the court, relying solely upon the *Cohen* case, held that an attorney has "an absolute right to invoke his constitutional privilege against self-incrimination" but that when he does so "he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar [App. B, p. 31]." The Appellate Division in no sense questioned either the applicability of the Fifth Amendment to petitioner's refusal to testify and to produce records or his good faith in asserting that privilege, but it held that he must make an election between incrimination and disbarment.

The Court of Appeals affirmed the judgment of the Appellate Division in a memorandum order without opinion, on the authority of *Cohen* "and on the further ground that the Fifth Amendment privilege does not apply to a demand" for production of records "required by law to be kept" by an attorney (App. C). Judge Fuld concurred, stating that while he adhered to his views in dissent in *Cohen*, see 166 N.E. 2d 672, 677-80, he deemed himself bound by that case.

#### Reasons for Granting the Writ

Petitioner's primary argument is that the court below erred in relying upon *Cohen v. Hurley*, *supra*, and that the governing decisions are *Malloy v. Hogan*, 378 U.S. 1, and other of this Court's decisions applying the Fifth Amend-

ment. Under those decisions, the State is precluded from requiring petitioner to elect between asserting the privilege and retaining the right to practice in his profession. If, however, the Fifth Amendment itself is thought not to preclude the State action here, then it is our alternative contention that the broader standards of due process and equal protection were breached by the State. And, finally, we show that the decision below cannot be supported by the Court of Appeals' partial reliance upon the "required records" doctrine of *Shapiro v. United States*, 335 U.S. 1.

1. *The decision below is in conflict with this Court's decision in Malloy v. Hogan, 378 U.S. 1, and other cases applying the Fifth Amendment.* The opinion of the Appellate Division relied solely upon this Court's decision in *Cohen v. Hurley, supra*, and the Court of Appeals also relied upon that case. In *Cohen*, this Court, over the dissents of four of its members, upheld the disbarment of an attorney for his refusal to testify and to produce records in the same Judicial Inquiry involved in the instant case. The Court held that it was neither arbitrary nor discriminatory for New York to disbar an attorney who, by claiming his state constitutional privilege against self-incrimination, failed to cooperate adequately with the Inquiry. The Court passed only upon petitioner's question of fundamental fairness under the Fourteenth Amendment, holding that "a State has great leeway in defining the reach of its own privilege against self-incrimination . . . ." 366 U.S., at 125. The Court also held that petitioner had not preserved any Fifth Amendment claim and that, in any event, no Fifth Amendment privilege was applicable in a State proceeding.<sup>1</sup>

<sup>1</sup> Whether the State of New York may impose certain sanctions, pursuant to Article I, Section 6 of its Constitution, upon persons who invoke the privilege against self-incrimination of the Fifth Amendment, in the light of the applicability to the States of that Amendment's self-incrimination clause, is now before this Court in *Stevens v. Marks*, No. 210, and

In this case, however, petitioner has relied specifically upon the Fifth Amendment's protection at all stages, and he contends here, as he contended in the courts below, that the courts' reliance upon the standard of *Cohen* is in conflict with this Court's decision in *Malloy v. Hogan*, 378 U.S. 1. The *Cohen* premise that the Fifth Amendment privilege is not applicable against state action was rejected in *Malloy*, which held that "the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement. . . ." *Id.*, at 8. [Emphasis added.] The Court in *Malloy* specifically rejected the suggestion that "the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding," holding that "[i]f *Cohen v. Hurley* . . . and *Adamson v. California* . . . suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded." *Id.*, at 10-11.

The federal standard, which the courts below have failed to apply, is clear from *Malloy*—the State may not infringe "the right of a person to remain silent unless he chooses to

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*Stevens v. McCloskey*, No. 290, cert. granted, 382 U.S. 809 (Oct. 12, 1965). Those cases involve the dismissal of a policeman for his refusal to sign a waiver of immunity in connection with prospective testimony before a grand jury. Petitioner contends that, if the Court concludes that the Fifth Amendment precludes Stevens' dismissal for his insistence upon retaining his privilege against self-incrimination, a *fortiori* petitioner must prevail on question 1 in this petition. Should the Court conclude that Stevens' dismissal is not precluded by the Fifth Amendment, however, that decision would not be dispositive of this case. See, e.g., *In re Holland*, 36 N.E. 2d 543 (Ill.), which held that an attorney could not be disciplined for refusing to cooperate in an investigation by claiming his state privilege against self-incrimination. The court distinguished cases upholding the discharge of policemen for claiming the privilege. See also Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 498-508 (1957).



speak in the unfettered exercise of his own free will and to suffer no penalty . . . for such silence." *Id.*, at 8. Last Term the Court reaffirmed that standard in *Griffin v. California*, 380 U.S. 609, 614, holding that comment by a prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." That broad protection of the federal privilege has been recognized at least since *Boyd v. United States*, 116 U.S. 616, 634-5, and has been reaffirmed repeatedly by this Court. See, e.g., *Counselman v. Hitchcock*, 142 U.S. 547; *Hoffman v. United States*, 341 U.S. 479.

In *Griffin* and *Boyd*, as in this case, the government sought to impose an election, an alternative to relinquishment of the privilege. The election in *Griffin* was to suffer the consequences of comment on the refusal to testify; in *Boyd* it was the forfeiture of thirty-five cases of plate glass in a forfeiture proceeding; here it is the deprivation of the right to practice a profession in which petitioner has engaged for almost forty years. That election is no more permissible here than in *Griffin* and *Boyd*, since this Court has held that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Ex Parte Garland*, 4 Wall. 333, 377; see *Cummings v. Missouri*, 4 Wall. 277, 322.

Nor can it fairly be disputed that petitioner's disbarment was based upon invocation of his privilege under the Fifth Amendment. Both the opinion of the Appellate Division and the referee's report establish that the charge of petitioner's purported failure to cooperate with the Judicial Inquiry was sustained only as to his refusal to testify and to produce records, and they also establish that the refusal was based upon a good faith claim of his Fifth Amendment



privilege. Indeed, the referee refrained from making a finding as to whether petitioner's refusal was a violation of his duties as an attorney on the ground that the question was "inextricably bound up with the constitutional issues raised" by him. Faced with this Court's decision in *Slochower v. Board of Education*, 350 U.S. 551, 558, that a statute which "operates to discharge every city employee who invokes the Fifth Amendment" is unconstitutional, the Appellate Division stated that its order was not grounded upon petitioner's invocation of the privilege but upon his refusal to cooperate with the Judicial Inquiry. The opinion, however, unequivocally lays down an inflexible rule which admits of no exception. If an attorney "elects to invoke his constitutional privilege against self-incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar [App. B., p. 32]." It is evident, therefore, that the distinction asserted by the court below is solely verbal and not substantial. For this reason whether the disbarment is said to be based upon a failure to cooperate or upon the plea of self-incrimination the "legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings v. Missouri*, *supra*, at 325.<sup>3</sup>

The importance of the application of the federal standard of the Fifth Amendment's self-incrimination privilege in

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<sup>3</sup> *Nelson v. Los Angeles County*, 362 U.S. 1, which held that it was not a violation of due process for a state employee to be discharged for insubordination in failing to comply with his employer's order to answer questions by a federal tribunal, is not to the contrary. First, the question of whether the discharge was in violation of the self-incrimination clause of the Fifth Amendment was not presented. Moreover, as shown below, the due process issue was decided upon the basis of a premise that is no longer valid.

disciplinary proceedings against attorneys is apparent from the conflicting decisions of state courts concerning attorneys' claims of the privilege on either state or federal constitutional grounds.<sup>4</sup> Compare *In Re The Integration Rule of the Florida Bar*, 103 So. 2d 873, 875 (Fla.) ("This court is committed to the doctrine that claiming the privilege . . . may not be considered a breach of duty to the court."); *Sheiner v. State*, 82 So. 2d 657 (Fla.); *In re Holland*, 36 N.E. 2d 543 (Ill.); and *In re Grae*, 26 N.E. 2d 963 (N.Y.); with *In re Fenn*, 128 S.W. 2d 657 (Mo.); and *Johnson v. State Bar of California*, 52 P. 2d 928 (Cal.). See generally, Note, *The Privilege to Practice Law versus the Fifth Amendment Privilege to Remain Silent*, 56 N.W.U.L. Rev. 644 (1961).

2. *The disbarment of petitioner for his refusal to relinquish his privilege against self-incrimination is arbitrary and discriminatory state action in violation of the Fourteenth Amendment.* Petitioner contends that the specific standard of the Fifth Amendment, as applied to the states in the Fourteenth Amendment, precludes the action at issue in this case. But even if the State's action in disbarring petitioner is thought for some reason not to fall within the specific prohibition of the Fifth Amendment, that action offends the more generalized standards of the due process and equal protection clauses of the Fourteenth Amendment, which prohibit arbitrary or discriminatory action resulting either in the deprivation of one's right to practice a profession or in his dismissal from public

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<sup>4</sup> Petitioner has found no federal court decisions considering the precise issue in the light of the Fifth Amendment's self-incrimination clause. But, in *Ex Parte Wall*, 107 U.S. 265, 271, upholding the disbarment of an attorney from a federal court upon proof of participation in a lynching against an assertion of deprivation of Fifth Amendment due process, the Court thought it worthy of note that "the petitioner was not required to criminate himself by answering under oath."

employment. *Königsberg v. State Bar*, 353 U.S. 252; *Schware v. Board of Law Examiners*, 353 U.S. 232; *Slo-chower v. Board of Education*, *supra*; *Weiman v. Updegraff*, 344 U.S. 183.

Preliminarily, it is important to recognize that this Court's decision in *Cohen v. Hurley*, *supra*, and its analogous decisions in *Nelson v. Los Angeles County*, 362 U.S. 1; *Lerner v. Casey*, 357 U.S. 468; and *Beilan v. Board of Education*, 357 U.S. 399, are not controlling on this issue in light of *Malloy v. Hogan*, *supra*. In both *Cohen*, 366 U.S., at 118, and *Lerner*, 357 U.S., at 478-9, the Court held that there could be no reliance upon the Fifth Amendment privilege in the state proceedings there involved. In *Beilan* the Pennsylvania Supreme Court's determination that the dismissal was entirely unrelated to Beilan's claim of privilege was accepted by this Court, 357 U.S., at 402, n. 3. *Nelson*, on the other hand, did involve state sanctions that resulted from the invocation of the Fifth Amendment. But *Nelson* was decided at a time when it was not considered arbitrary for a state even to compel testimony, in the face of an assertion that it would incriminate the claimant under federal law. *Knapp v. Schweitzer*, 357 U.S. 371.<sup>5</sup> *A fortiori* it was not then considered arbitrary for a state to discharge an employee who claimed his federal privilege against self-incrimination.

In sum, if the case is to be tested by the fundamental

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<sup>5</sup> The premise of *Knapp*, which was decided on the same day as *Beilan* and *Lerner* and which was equally applicable to those cases, was that "[i]t is plain that the [Fifth] Amendment can no more be thought of as restricting action by the States than as restricting the conduct of private citizens. The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government. . . ." 357 U.S., at 380. This Court's subsequent rejection of that premise, which destroyed the validity of *Knapp*, see *Murphy v. Waterfront Comm'n*, 378 U.S. 52, is thus no less destructive of *Lerner* and *Beilan*, as well as *Nelson*.



fairness standard of the Fourteenth Amendment, *Malloy* has introduced an important new element: the obligation of the State under the Fourteenth Amendment to preserve inviolate a person's claim of the Fifth Amendment.\* The question, then, is whether the action of the State in forcing petitioner to choose between his livelihood and the privilege is so offensive to the community's sense of fair play as to be arbitrary or discriminatory under the due process and equal protection clauses.

There is no denying the fact that the state has imposed a grievously heavy penalty upon petitioner's claim of his Constitutional right. In whatever verbal formula the State's motive may be couched, the inescapable fact is that petitioner's claim of his privilege was the act that produced the disbarment. It is also perfectly obvious that the State's action will have an inhibiting effect on the freedom of persons to claim the privilege. And it is surely unnecessary to emphasize the vital importance of the Fifth Amendment in our scheme of Constitutional government. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55.

Petitioner in no sense disputes that the State has a legitimate interest in maintaining high standards of competence and character among the members of the legal profession. At the same time, it is relevant to the Fourteenth Amend-

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\* The Court has held that it is not arbitrary for a state to deny admission to its bar to one who, by asserting a privilege under the First Amendment not to answer certain questions, was said to have thwarted a full investigation into the qualifications which he was required to prove in order to gain admission. *Konigsberg v. State Bar*, 366 U.S. 36. In so deciding, the Court rejected the petitioner's contention that his First Amendment right was absolute and held that it was outweighed by the State's interest. *Id.* at 52. Since that decision was rendered under the premise that "the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances," *Barenblatt v. United States*, 360 U.S. 109, 126 [Emphasis added], the *Konigsberg* case did not present the issue involved here.



ment question that this interest of the State is not of pre-eminent importance. It is not of the same order, for example, as society's interest in self preservation in a time of grave national emergency. Indeed, the interest arguably is of no greater importance than the State's interest in convicting the guilty—an interest that by the explicit command of the Constitution is made subordinate to the Fifth Amendment.

But granting the legitimacy of the State's interest, the critical question remains whether what the State has done is reasonably necessary to preserve the integrity of the bar, since the State may not, by characterizing the practice of a law as a "privilege" rather than a right, withhold or discontinue the exercise of that "privilege" without meeting the standards of the Fourteenth Amendment, *Schwartz v. Board of Law Examiners*, *supra*, at 239, n. 5, nor can it "in the guise of prohibiting professional misconduct, ignore constitutional rights." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438. See *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1. See generally Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

Plainly, no such reasonable relationship has been established. With respect to this case, petitioner's pleadings in actions before the courts and the statements of retainer that he filed disclosed the identity of all of his clients, so that the state had but to take the time required for careful investigation in order to establish whether a case against him could be made. And beyond the facts of this case, petitioner suggests that there is nothing in reason or experience to indicate that the maintenance of high standards of conduct by attorneys will be prejudiced in any material way if they, as well as other citizens, are permitted to invoke their Fifth Amendment rights without fear of loss of livelihood and reputation. Perhaps the

development of independent evidence is not as efficient as convicting a man out of his own mouth or disbaring him if he refuses to "cooperate," but the Bill of Rights ordains that where its protections conflict with the efficiency of a system of law enforcement, the fault lies in the system and not in the Constitution. *Escobedo v. Illinois*, 378 U.S. 478, 490.

Moreover, the procedure employed here by the State does not merely denigrate an important constitutional right unnecessarily. It is fraught with the same danger that is characteristic of all devices which undermine the guarantees of the Fourth, Fifth and Sixth Amendments: it is bound to punish the innocent along with the guilty. This Court has emphatically "scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." *Slochower v. Board of Education*, *supra*, at 557.<sup>7</sup>

Finally, the arbitrary and discriminatory nature of the State's position is particularly apparent in its application to the Judicial Inquiry in which petitioner's testimony and production of records were sought. While, pursuant to a specific request, petitioner was permitted to have counsel during his questioning (R. 44-45), but compare *Anonymous v. Baker*, 360 U.S. 287, the Inquiry was "a secret investigation (R. 31, statement of Presiding Justice.)" No specific charges were made against petitioner, and he had no right

<sup>7</sup> The investigation, through questioning of third parties, into the charges against petitioner which were withdrawn by respondent, was not made part of the record, but respondent will agree that such an investigation was made. The record shows only that the charges were made, petitioner denied them, and respondent withdrew them. See Ref. Rept. 3; R. 8.

of cross-examination. See *Id.*, at 292-3.<sup>8</sup> It is in just this sort of proceeding that the Court has recognized the privilege to be most valuable. See *Grunewald v. United States*, 353 U.S. 391, 422-23. To be sure, the State recognizes petitioner's absolute right—as a citizen—to claim the privilege, but only at an impermissibly high price—the forfeiture of the right to practice his profession.<sup>9</sup>

3. *The State may not deprive petitioner of the Fifth Amendment privilege against compulsory production of his*

<sup>8</sup> In the *Baker* case, the Court upheld the contempt convictions of two private investigators who refused to testify before the Judicial Inquiry because they were not permitted to have their counsel in the hearing room during the interrogation. In holding the secret interrogation without presence of counsel consistent with due process of law, the Court noted the availability to the petitioners of the state privilege against self-incrimination, and quoted the following from the interim report of the Presiding Justice:

"We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.

"As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and 10 doctors. Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts." 360 U.S., at 296, n. 11.

Presumably in an effort to lower if not remove the roadblock, so that the necessity of independent evidence would not be so pressing, the *Cohen* "test case" was developed.

<sup>9</sup> The position of the State is no more supported by history than by reason. Petitioner has found only one instance in which this Court was faced with the compatibility of the Fifth Amendment and the duty of its officers. In *Marbury v. Madison*, 1 Cranch 137, Attorney General Levi Lincoln was summoned before the Court to testify as to acts performed when he was Secretary of State. In response to his objection to answering certain questions, the Court stated that he was not "obliged to state anything which would criminate himself. . . ." *Id.*, at 144. The history of New York's own privilege, prior to *Cohen*, is similarly devoid of any support. See *In Re Cohen*, 166 N.E.2d 672, 677-680 (dissenting opinion of Fuld, J.), *aff'd sub nom. Cohen v. Hurley*, *supra*. Cf. cases cited *supra*, p. 11.



financial records and documents by a requirement that attorneys preserve records of that type. The Appellate Division explicitly recognized that petitioner had "an absolute right to invoke his constitutional privilege against self-incrimination and to refuse" to testify and to produce the records for which the subpoena called, but held that he could nonetheless be disbarred for exercising that right. In its memorandum order, however, the Court of Appeals relied not only upon the *Cohen* case but also "on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U.S. 482; *Shapiro v. United States*, 335 U.S. 1) [App. C]." Thus, the Court of Appeals reversed the Appellate Division's holding that the privilege was applicable to petitioner's refusal to produce records,<sup>10</sup> although it agreed with the holding that the privilege applied to his refusal to testify.

Assuming arguendo that the Fifth Amendment privilege does not, by virtue of the so-called "required records exception," preclude the State from compelling petitioner to produce his financial records and documents, that exception would not remove the privilege to refuse to testify, either in general or with reference to the required records. *Shapiro v. United States*, 335 U.S. 1, 27; see *Curcio v. United States*, 354 U.S. 118. The respondent's petition for disciplinary proceedings, the referee's report, the Appellate Division opinion, and the order and amended remittitur of the Court of Appeals establish that petitioner's disbarment was based upon both the refusal to answer questions

<sup>10</sup> No such suggestion appears in the court's opinion in the *Cohen* case. 186 N.E. 2d 672. While the focus of that case was on Cohen's refusal to testify, he was also called upon to produce records and the petition for disciplinary action was based upon his refusal both to produce records and to answer questions. *Cohen v. Hurley*, 366 U.S. 117, 121.



and the refusal to produce records. Therefore, if the Court accepts petitioner's argument to the extent that petitioner could not constitutionally be disbarred for his refusal to testify, the fact that the disbarment order was also based in some inestimable degree upon an unprivileged refusal to produce records would not salvage that order, see *Jackson v. Denno*, 378 U.S. 368; *Fahy v. Connecticut*, 375 U.S. 85, and the Court thus would not have to reach the question whether the records could be withheld under a claim of privilege. Should the Court believe it appropriate to reach that question, however, petitioner contends that the doctrine of *Shapiro* should be reconsidered and rejected in light of subsequent decisions of this Court, or, in the alternative, that the doctrine, whatever its validity in the context of *Shapiro*, is not applicable to the instant case.

a. *This Court's decision in Shapiro v. United States is no longer valid in light of its subsequent decision in Albertson v. S.A.C.B., — U.S. —, and of other decisions applying the Fifth Amendment.* In the *Shapiro* case the Court held that the Fifth Amendment privilege did not apply to sales records required to be kept by food licensees under wartime regulations of the Office of Price Administration, since those records lost their character as private papers and acquired " 'public aspects.' " 335 U.S., at 34. The case involved a fruit and vegetable wholesaler licensed under the Emergency Price Control Act, 56 Stat. 23, who was tried on charges of having made sales in violation of OPA regulations. He contended that because he had produced, under subpoena, sales records required to be kept by him under OPA regulations and had been assured that such production conferred upon him the immunity which flowed from the immunity provisions of the Emergency Price Control Act, he could not be prosecuted for violations disclosed by such records. The Court, in a long opinion devoted to the construction of the immunity provision of the Act, rejected the

petitioner's contention that its scope was broader than the boundaries of the Fifth Amendment and held that no immunity applied to the petitioner by virtue of his record production. Noting that petitioner had not duly raised the question, the Court then held that the Act was constitutional as thus construed. The Court assumed that "there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper," 335 U.S., at 32, but held that the bounds were not exceeded in that case.

The principal authorities cited for that conclusion were *Wilson v. United States*, 221 U.S. 361, which held that the president of a corporation had no Fifth Amendment privilege to resist the production of corporate rather than personal records merely because they were in his custody, and *Davis v. United States*, 328 U.S. 582, which held that gasoline ration coupons issued by the OPA under regulations which provided that such coupons did not become private property but remained the property of the government were not protected by the Fourth and Fifth Amendments to the same degree as are private papers. Thus *Shapiro* used the premise that documents belonging to a third party do not become "personal," and as such protected by the privilege solely because they are in the custody of the individual claiming the privilege, to reach the conclusion that documents admittedly personal can be deprived of that character (and thus of the Fifth Amendment's protection) through a federal statute or regulation requiring that the documents be kept.<sup>11</sup>

<sup>11</sup> The Court in *Shapiro* quoted a dictum from *Wilson* as quoted in *Davis* to the effect that the privilege does not apply to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regula-

The rationale of *Shapiro*,<sup>12</sup> which is not that the Fifth Amendment must be balanced against countervailing governmental interests but rather that the privilege simply does not apply because of waiver or because required records lose their character as private papers, has been rejected by most commentators, who have urged re-examination of the doctrine. See, e.g., Note, Required Information and the Privilege Against Self-Incrimination, 65 Colum. L. Rev. 681 (1965); Note, Constitutional Limits on the Admissibility in the Federal Courts of Evidence Obtained from Required Records, 68 Harv. L. Rev. 340 (1954); Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

The required records doctrine of the *Shapiro* case should be reconsidered and rejected for three reasons: First, it is an unwarranted limitation upon the scope of the privilege as earlier applied in *Boyd v. United States*, *supra*, which held unconstitutional under the Fifth Amendment (and also the Fourth) a statute calling for the compulsory production, in suits for forfeiture, of business books, invoices or papers of the defendant or claimant.<sup>13</sup> Under the *Shapiro* doctrine, except as read in its narrowest sense, see *Curcio v. United States*, *infra* note 15, the importer-claimant's invoice in *Boyd* was a required record not within the protection of

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tion," 335 U.S., at 33, but that language cannot be divorced from the context of the questions with which the Court was faced in *Wilson and Davis*. See *Id.*, at 56-60 (dissenting opinion of Frankfurter, J.).

<sup>12</sup> Section 5 of an Act to amend the customs-revenue laws and to repeal moiety, 18 Stat. 187:

"That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the Attorney representing the government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion . . . and thereupon the court . . . may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court. . . ."



the Fifth Amendment.<sup>13</sup> Second, *Shapiro* is inconsistent with subsequent injunctions of the Court that the privilege "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486; see *Quinn v. United States*, 349 U.S. 155, 162. Third, *Shapiro* is inconsistent with the Court's decision this Term in *Albertson v. S.A.C.B.*, — U.S. — (Nov. 15, 1965).

In the *Albertson* case, the Court held that sections 8(a) and (c) of the Subversive Activities Control Act of 1950, 50 U.S.C. 787(a) and (c), and orders under those sections requiring petitioners to register as members of the Communist Party by completing and filing registration statements, were violative of the self-incrimination clause of the Fifth Amendment. The Court cited cases in which it had held that witnesses could not be compelled to testify as to Communist party membership or association, and held that, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes. Cf. *People of New York v. Reardon*, 197 N.Y. 236, 243-244, 90 N.E. 829, 832." — U.S., at —.<sup>14</sup> That holding in itself is inconsistent with *Shapiro*, which established just such a constitutional difference between compelling oral testimony and compelling documentary evidence. 335 U.S., at 27. If the privilege

<sup>13</sup> Sections 9 and 10 of the same Act under which the government compelled production of the invoice in *Boyd*, prohibited the entry into the United States of any foreign goods valued in excess of \$100 "without the production of an invoice thereof as required by law" or an affidavit showing why such invoice could not be produced and showing the actual cost or foreign market value of the goods. 18 Stat. 188.

<sup>14</sup> In *Reardon*, the New York Court of Appeals, relying in part on *Boyd v. United States*, struck down, under the State privilege against self-incrimination, a statute which provided that "the [State] Comptroller shall have the right and it shall be his duty to examine the books and papers of any person . . . , and memoranda of [stock] transfers shall remain accessible for such inspection for three months from their respective dates." 90 N.E., at 831.



is violated by a requirement that an individual prepare and file a registration statement with the government, it is violated equally by a requirement that an individual keep records which must be surrendered upon the government's call. Surely the *Albertson* case means more than that the statute must be amended to require that records be kept of the information called for by the registration form.

Admittedly there are factual differences between this case and *Albertson*, notably the fact that the general probabilities of incrimination from filing registration statements under the 1950 Act are substantially greater than from keeping and producing records under the Appellate Division rule at issue here. But the significance of that distinction is not determinative since the privilege depends only upon the tendency and not the certainty of incrimination, *Counselman v. Hitchcock*, *supra*; *Quinn v. United States*, *supra*; and petitioner finds no other significant distinctions which detract from the following conclusion of a commentator shortly after the 1950 Act was passed:

"Accordingly, unless the Court . . . upholds the registration provisions [of the 1950 Act] as compatible with the privilege, it must repudiate the *Shapiro* doctrine, or limit it in some fashion which will suggest the Court's appraisal of the substantive policy implemented by informational requirements." Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 727 (1951).

Regardless of whether the impact of *Albertson* upon *Shapiro* is as clear as we believe, the question of the continued vitality of *Shapiro* in light of *Albertson* is surely a question deserving consideration by this Court. The Court has not, since *Shapiro*, applied its doctrine or explained the scope of the limitations upon that doctrine which the

Court acknowledged in that very case. *Cf. United States v. Kahriger*, 345 U.S. 22. In view of the continuous restriction of the area of activity that is beyond the reach of the government's regulatory powers, which correspondingly increases the potential of the *Shapiro* doctrine as a vehicle for draining the Fifth Amendment of a substantial part of its force, the uncertainty as to the reach of *Shapiro* should be resolved.

That there is much uncertainty as to the reach of *Shapiro* is evidenced by the conflicting interpretations given that case by the Courts of Appeals and District Courts. In *Beard v. United States*, 222 F.2d 84, 93 (4th Cir.), *cert. denied*, 350 U.S. 846, the court interpreted *Shapiro* as holding "that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs relating to the public interest become public records in that they fall outside the constitutional protection of the Fifth Amendment." In *United States v. Remolif*, 227 F. Supp. 420, 423 (D. Nev.), however, the court limited *Shapiro* to its "exact holding" concerning "books and records required by law to be kept and maintained under the Emergency Price Control Act," holding that it could not be interpreted "as abolishing the protection of the Fifth Amendment with respect to a person's books and records merely because one or more of innumerable state and federal laws may require records of that type to be kept."<sup>15</sup> For further examples of the conflict

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<sup>15</sup> In *Curcio v. United States*, 354 U.S. 118, the Court held that a union official could not be compelled, upon a claim of the Fifth Amendment privilege, to answer questions relating to union records in his custody which he had refused to produce. In citing the statement in *Shapiro* that "all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege," the Court in *Curcio* characterized *Shapiro* as holding "that the privilege against self-incrimination did not apply to records required to be kept by food licensees under wartime OPA regulations. . . ." *Id.*, at 124.

in interpretation and application of the *Shapiro* doctrine, compare *United States v. Clancy*, 276 F.2d 617, 630-1 (7th Cir.), reversed on other grounds *sub nom. Clancy v. United States*, 365 U.S. 312, with *Russell v. United States*, 306 F.2d 402, 410-411 (9th Cir.), and *United States v. Ansani*, 138 F.Supp. 451 (N.D. Ill.).

b. *The Shapiro doctrine is inapplicable to the record requirement in this case.* Assuming that the *Shapiro* doctrine is not wholly invalid, the factors discussed above show at least that it must be limited so that the power to compel production of records against a claim of privilege is narrower than the full scope of Congressional and State power to require the keeping of records.<sup>16</sup> Under any reasonable limitations, the doctrine would not be applicable in this case. One limitation which has been suggested is that the privilege should be inapplicable only where evidence from the records involved is clearly essential to the implementation of a regulatory program and where there are no other available means of enforcement which are less repugnant than requiring a serious inroad into the scope of the privilege. See Note, Constitutional Limits Upon the Admissibility in the Federal Courts of Evidence from Required Records, 68 Harv. L. Rev. 340, 345 (1954); Comment, 9 Stan. L. Rev. 375 (1957). This test, while it has not been

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<sup>16</sup> Even if the *Shapiro* doctrine is rejected entirely, any possible impairment of the government's enforcement of regulatory programs would be relatively slight, since documents could be withheld only by natural persons who chose to claim the privilege. There would be no effect upon the regulation of corporations, *Wilson v. United States*, *supra*, or unincorporated associations such as partnerships, *United States v. Silverstein*, 314 F.2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807, or labor unions, at least to the extent that such an association "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *United States v. White*, 322 U.S. 694, 701.



met by the State in this case, would still seem to be at odds with the Court's recognition that the Fifth Amendment privilege is not to be balanced against competing State interests. See *Barenblatt v. United States*, 360 U.S. 109, 126.

Another limitation of the doctrine (which, in petitioner's view, would still be an unwarranted limitation upon the privilege) may be found in the Court's reliance in *Shapiro* upon the fact that the sales record required to be kept and produced by the petitioner "recorded" a transaction in which he "could lawfully engage solely by virtue of the license granted him under the statute." 335 U.S., at 35. Under this analysis only documents which served this recording function would lose the protection of the privilege.

No such records are involved here. The transactions in which petitioner engaged by virtue of his license were fully recorded in the pleadings filed in the Appellate Division and other courts and in the statements of retainer which he filed and which are not in issue here. If respondent sought to enforce any ethical or legal requirements against petitioner, he had ready access to the information necessary to do so. But the records called for in the subpoena directed to petitioner, which respondent apparently contends are required to be kept under Special Rule 5 of the Appellate Division, are of a completely different character, see App. F, including such items as his check books, savings account pass books, records of all loans made, and state and federal tax returns. Petitioner submits that if indeed Rule 5 embraces the documents called for in the subpoena directed to him,<sup>17</sup> "[i]t is impossible to adopt any normal

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<sup>17</sup> Under any normal reading of the subpoena the documents which petitioner was directed to produce were not those required to be kept under Rule 5, which was amended and renumbered as Rule IV(6), in 1961, see Civil Practice Annual 9-26 (1965), except to the extent that, through the great breadth of the subpoena, some few required records may have



conception of private books and papers which would not include those . . . enumerated," *People v. Reardon, supra*, at 831, and the Rule is therefore not within the scope of *Shapiro* and does not remove the Fifth Amendment privilege.

### Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE J. LATTO

WILLIAM H. DEMPSEY, JR.

MARTIN J. FLYNN

734 Fifteenth Street, N.W.

Washington, D.C. 20005

*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATZKIN

235 East 42nd Street

New York 17, New York

SHEA & GARDNER

734 Fifteenth Street, N.W.

Washington, D.C. 20005

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been included. The record shows no suggestions in the Judicial Inquiry or in the hearing in the Appellate Division to the effect that petitioner should produce only the records covered by Rule 5 or even that petitioner's privilege was removed partially or completely by reason of Rule 5. To the contrary, both the Presiding Justice in the Judicial Inquiry and the Appellate Division determined that petitioner's privilege was fully applicable to his refusal to testify and to produce the documents. Petitioner will argue, if certiorari is granted, that it would be a deprivation of due process to apply the *Shapiro* doctrine in these circumstances, even if that doctrine is given the broadest possible application.

**APPENDIX A**

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 19th day of July, 1965.

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice.  
 ARTHUR D. BRENNAN,  
 L. BARRON HILL,  
 JAMES D. HOPKINS,  
 A. DAVID BENJAMIN, Justices.

In the Matter of SAMUEL SPEVACK, an attorney

SOLOMON A. KLEIN, *Petitioner*;

SAMUEL SPEVACK, *Respondent*.

**Order of Disbarment**

A proceeding having been instituted in this court upon the petition of Solomon A. Klein, verified the 8th day of July, 1963, in respect to Samuel Spevack, an attorney and counselor at law admitted in this department on March 3, 1926, petitioning for an order directing that the respondent Samuel Spevack, as an attorney and counselor at law, be disciplined upon the charges set forth in said petition, and why such other or further action upon the charges embodied in said petition, as justice may require, should not be had, and for such other and further relief as may be just and proper, and the respondent having filed an answer, and this court by order dated September 23, 1963 having referred the issues raised by the petition and the answer to Harold F. McNiece, Esq., as referee, for hearing and for a report setting forth his findings upon the issues, and the Referee, after holding an extensive hearing at which testimony was taken, having filed his report dated October 21, 1964 with this court on said date, together with the testimony and exhibits, and the petitioner having moved to confirm the Referee's report and for the imposition of an

appropriate measure of discipline upon the respondent, by notice of motion, dated April 29, 1965.

Now on reading and filing said notice of motion, petition, answer, affidavit of Solomon A. Klein and memorandum of petitioner in support of motion to confirm report, affidavit of Bernard Shatzkin and memoranda of respondent in opposition to petitioner's motion, the report of the Referee, the testimony and exhibits, and all the papers filed herein, and the said motion having been submitted by Mr. Solomon A. Klein, petitioner appearing in person and submitted by Messrs. Shatzkin and Cooper of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered that the petitioner's motion to confirm the Referee's report be and the same hereby is granted; and it is further

Ordered that the report of the Referee and the Referee's findings be and the same hereby are confirmed; and it is further

Ordered that on the basis of the Referee's unchallenged finding that respondent refused to testify and to produce his records the respondent Samuel Spevack be and he hereby is disbarred from practice as an attorney and counselor at law effective October 1, 1965; and it is further

Ordered that the name of Samuel Spevack be and the same hereby is struck from the role of attorneys and counselors at law in the State of New York effective October 1, 1965; and it is further

Ordered that the said Samuel Spevack be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, and he is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law of its application or any advice in relation thereto effective October 1, 1965.

Enter:

JOHN J. CALLAHAN,

Clerk.



**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE  
DIVISION, SECOND JUDICIAL DEPARTMENT,**

**Clerk's Office, Borough of Brooklyn, N.Y.**

I, JOHN J. CALLAHAN, Clerk of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the Appeal in the above entitled action or proceeding, and entered in my office on the 19th day of July, 1965.

[SEAL] IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 22nd day of July, 1965.

— /s/ JOHN J. CALLAHAN,

**Clerk.**



## APPENDIX B

Opinion of the Supreme Court of New York, Appellate  
Division, Second Department

No. 1209.

In the Matter of SAMUEL SPEVACK, an attorney.

SOLOMON A. KLEIN, *petitioner*;SAMUEL SPEVACK, *respondent*.

This is a proceeding to discipline respondent, an attorney at law, for professional misconduct. The issues of fact were referred to a Referee for a hearing and for a report setting forth his findings upon the issues. The Referee, after holding an extensive hearing, has filed his report setting forth findings which are partly in favor of the respondent and partly adverse to him. The petitioner now moves to confirm the Referee's report and for the imposition of an appropriate measure of discipline upon respondent.

While originally ten charges were made against respondent, only one survives for our consideration; further reference to this one surviving charge will be made below. As to eight of the charges, the petitioner offered no proof and has in effect abandoned them. As to the ninth charge, the Referee found that petitioner had failed to sustain the burden of proof and that respondent was not guilty.

The remaining tenth charge—the sole charge now in issue—is that respondent refused to honor a subpoena duces tecum duly served upon him, in that he had refused to produce his financial records and had refused to testify before the justice presiding at said Judicial Inquiry; and that such refusal constituted a breach of his inherent duty as an attorney and counselor at law to divulge to the court all pertinent information bearing upon his character and fitness and upon his conduct and practices as a lawyer. The learned Referee has found, and the respondent does not deny that, while at times he may have wavered in his refusal, his refusal finally became intransigent and absolute.

Respondent's sole defense is that his refusal was based on the ground that the production of his records and his testimony would tend to incriminate him; that he was entitled to rely on the relevant state and federal constitutional provisions protecting him against self-incrimination; and that as a matter of law such reliance on the constitutional provisions cannot be made the basis of any disciplinary action by this court.

Our view, as previously stated, is that a lawyer, like any other citizen, has an absolute right to invoke his constitutional privilege against self-incrimination and to refuse to supply the pertinent information; but that when a lawyer does so he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar (*Matter of Cohen v. Hurley*, 9 A D 2d 436, *affd.* 7 N Y 2d 488, *affd.* 366 U. S. 117, rehearing denied 374 U. S. 857, 379 U. S. 870). As we stated in *Cohen* (pp. 448-449):

"To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

In our opinion, the doctrine which we enunciated in *Cohen* has been in no way undermined or impaired by any contrary holding in the subsequent case of *Malloy v. Hogan* (378 U. S. 1), as urged by respondent. In that case, the petitioner had been held in contempt and imprisoned in consequence of his refusal to answer questions on the ground that his testimony would tend to incriminate him. But the petitioner there was not a member of the bar and,

of course, his right to retain his membership in the bar, despite his refusal, was in no way involved.

Under the circumstances, this court has no alternative other than to disbar the respondent. If he elects to invoke his constitutional privilege against self incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar. To that doctrine this court must adhere.

Accordingly, the petitioner's motion to confirm the Referee's report is granted; the Referee's findings are confirmed; and, on the basis of his unchallenged finding that respondent refused to testify and to produce his records, the respondent is disbarred and his name directed to be struck from the roll of attorneys and counselors at law in the State of New York, effective October 1, 1965.

CHRIST, Acting P.J., BRENNAN, HILL, HOPKINS and BENJAMIN, JJ., concur.

July 19, 1965.



**APPENDIX C**

**Copy of Minute furnished by Clerk of the Court of Appeals  
of the State of New York:**

**2. No. 459 65**

**In the Matter of SAMUEL SPEVACK, an Attorney.**

**SOLOMON A. KLEIN, Respondent,**

**SAMUEL SPEVACK, Appellant.**

Order affirmed on the authority of *Cohen v. Hurley* (366 U.S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U.S. 482; *Shapiro v. United States* (335 U.S. 1). No opinion. All concur, Fuld, J. in the following memorandum: Although I still adhere to the views I expressed in dissent in Matter of Cohen, (7 N.Y. 2d 489, affd. sub nom *Cohen v. Hurley*, 366 U.S. 117), I deem myself concluded by that decision and, accordingly, concur for affirmance. (But cf. *Malloy v. Hogan*, 378 U.S. 1).



## APPENDIX D

## STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of January A. D. 1966.

Present, Hon. CHARLES S. DESMOND, Chief Judge, presiding.

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Mo. No. 27

In the Matter of SAMUEL SPEVACK, an Attorney,

SOLOMON A. KLEIN, *Respondent*,

SAMUEL SPEVACK, *Appellant*.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, vis: Appellant contended that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights.

**And the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.**

**A copy**

**[SEAL.]**

**GRABON KIMBALL,**  
**Deputy Clerk.**

**APPENDIX E*****United States Constitution, Amendment V***

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

***United States, Constitution, Amendment XIV***

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department*****RULE V**

**Preservation of Records of Actions, Claims and Proceedings.** In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought.

**APPENDIX F****(R. 118-19)**

**Q. Mr. Spevack, I ask you at this time if you will, pursuant to the subpoena of June 2, 1958, produce the day book requested therein. Just to speed the process, if your answer is the same, with permission of the Court, would you say the same?**

**A. Yes.**

**Q. Is your answer the same?**

**A. It is.**

**Q. Would you produce, pursuant to that subpoena, cash receipts book?**

**A. The answer is the same.**

**Q. Cash disbursements book?**

**A. The answer is the same.**

**Q. Check book stubs?**

**A. The answer is the same.**

**Q. Petty cash book?**

**A. The answer is the same.**

**Q. Petty cash vouchers?**

**A. The answer is the same.**

**Q. General ledger and general journal?**

**A. The answer is the same.**

**Q. Canceled checks, bank statements, duplicate deposition slips of regular and checking accounts, open and closed?**

**A. The answer is the same.**

**Q. Passbooks and evidence of accounts other than checking accounts, with all depositories, such as savings banks, savings and loan associations, postal savings, credit unions, etc.?**

**A. The answer is the same.**

**Q. Record of all loans made from financial institutions and others, open and closed?**

**A. The answer is the same.**

**Q. Payroll records consisting of: (A) Payroll book, (B) Social Security and withholding tax returns?**



**A. The answer is the same.**

**Q. Copies of Federal and State income tax returns and accountant's work sheets relative thereto?**

**A. The answer is the same.**

**Q. Mr. Spence, I ask you at this time if you will, put  
amount to the subpoena of June 2, 1938, produce the day book  
requested therein. Just to speed the process if your answer  
is the same, with permits me to ask, would you say**

**(7293-4)**

**A. Yes.**

**Q. Is your answer the same?**

**A. Yes.**

**Q. Would you produce, pursuant to that subpoena, cash  
receipts book?**

**A. The answer is the same.**

**Q. Cash disbursements book?**

**A. The answer is the same.**

**Q. Check book stubs?**

**A. The answer is the same.**

**Q. Petty cash book?**

**A. The answer is the same.**

**Q. Petty cash vouchers?**

**A. The answer is the same.**

**Q. General ledger and general journal?**

**A. The answer is the same.**

**Q. Cancelled checks, bank statements, deposits?**

**A. The answer is the same.**

**Q. Passbooks and evidence of accounts other than check  
ing accounts, with all depositories, such as savings banks,  
savings and loan associations, postal savings, credit unions,  
etc.**

**A. The answer is the same.**

**Q. Record of all loans made from financial institutions  
and others, open and closed?**

**A. The answer is the same.**

**Q. Payroll records consisting of: (A) Payroll book, (B)**

**Social Security and withholding tax returns?**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1965 *6*

No. ~~100~~ *62*

SAMUEL SPEVACK,

*Petitioner,*

—v.—

SOLOMON A. KLEIN,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF  
CERTIORARI TO THE COURT OF APPEALS OF THE  
STATE OF NEW YORK**

---

---

SOLOMON A. KLEIN,  
*Respondent, Attorney Pro Se,*  
16 Court Street,  
Brooklyn, New York 11201



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IN THE

**Supreme Court of the United States****October Term, 1965****SAMUEL SPEYACK,***Petitioner,***-v-****SOLOMON A. KLEIN,***Respondent.***BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF  
CERTIORARI TO THE COURT OF APPEALS OF THE  
STATE OF NEW YORK**

Petitioner seeks review of an order of the New York Court of Appeals, entered December 1, 1965, which unanimously affirmed an order of the Appellate Division, Second Judicial Department disbarring petitioner from the practice of law for professional misconduct.

**Opinions Below**

The memorandum opinion of the Appellate Division (App. B of Petition) is reported in 24 AD 2d 653. The memorandum order of the Court of Appeals (App. C of Petition) is reported in 16 NY 2d 1048. The amended remittitur of the Court of Appeals has not yet been reported and is printed as Appendix D of the Petition.



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## Statement of the Case

### 1.

Petitioner's disbarment arises out of an investigation ordered by the New York Appellate Division, which is charged by statute with the duty to supervise the professional conduct of attorneys. See N.Y. Judiciary Law, sec. 90, subd. 2. In performing this duty the Court has sought to control speculative financing of personal injury claims by attorneys who abuse the privilege to engage in contingent-fee practice. See *Gair v. Peck*, 6 NY 2d 97, 101-108, 111, certiorari denied 361 U.S. 374; MacKinnon, *Contingent Fees for Legal Services, A Study of Professional Economics and Responsibilities*, at 160-167 (1964).

Maintenance of the contingent-fee privilege—completely outlawed by earlier law—is deemed necessary to put the courts of justice within the reach of the poor citizen who has a meritorious cause of action for personal injuries but is financially unable to pay a fixed fee for representation by experienced counsel. *Gair v. Peck*, *supra*, 6 NY 2d at 103, 105-106; MacKinnon, *Contingent Fees*, etc., *supra*, at 5, 70; Radin, *Contingent Fees in California*, 28 Cal. Law Rev. 587, 589 (1940).

Experience, however, has demonstrated that the privilege to acquire a contingent financial interest in personal injury claims needs to be controlled in the interest of both the injured claimants and the due administration of justice. Overreaching by exaction of excessive fees from injured laymen, ignorant of law and pressed by financial need; unwarranted payments to referrers to encourage referrals of personal injury cases; congestion of court calendars by unworthy claims never intended to be brought

to trial, thereby causing long delays in bringing legitimate cases to trial—delays which amount to a denial of justice for those in need of prompt financial relief—are some of the evils fostered by the contingent-fee opportunity for financial gain. See, for example, *Anonymous v. Baker*, 360 U.S. 288, 289, fn 1; *Gair v. Peck*, *supra*, 6 NY 2d at 106-112.

To eliminate these evils the State could, of course, revert to outright abolition of the contingent-fee privilege. But, as above noted, this would impose an unjust burden upon the impoverished who would not otherwise be able to afford legal assistance.

The New York Appellate Division, in both the First and Second Judicial Departments, has therefore enacted Special Rules Regulating the Conduct of Attorneys who choose to avail themselves of the privilege to engage in contingent-fee personal injury practice. See Special Rules of the Second Department printed as an Appendix to this brief.

Rule 2 declares that an attorney who violates any of the special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law. Rule 3 requires the attorney to file with the Appellate Division retainer statements setting forth the percentage of the contingent-fee agreement and the source of the retainer.<sup>1</sup> Rule 4 requires that funds collected on behalf of the client be deposited forthwith in

---

1. Since July 1, 1960, such statements must be filed with the Judicial Conference of the State of New York. See Civil Practice Annual of New York (1964), Part Three of the Rules of the Appellate Division Second Department, Rule 4(a).

a special account, separate from his personal account. It also prohibits commingling with the attorney's own funds and directs him to give the client a closing statement setting forth the amount and date of receipt of the funds and the amount which he claims to be due for his services and disbursements. And Rule 5 imposes the obligation to preserve for a period of at least five years after settlement or other termination of the case:

"the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof."

This record-keeping requirement of Rule 5 encompassed the financial records specified in the Appellate Division's subpoena duces tecum directing petitioner to produce them. His motion to quash the subpoena was litigated in a separate proceeding which resulted in a denial of his challenge to its validity. *Matter of Anonymous (No. 14) v. Arkwright*, 7 AD 2d 874, leave to appeal denied 5 NY 2d 710, certiorari denied 359 U.S. 1009. And in affirming petitioner's disbarment for refusing to produce the records the New York Court of Appeals held that the records specified in the subpoena were "records required by law to be kept by him". *Matter of Spevack*, 16 NY 2d 1048, 1050. See also the Court of Appeals amended remittitur printed as Appendix D of the Petition.

## 2.

It was pursuant to the foregoing Special Rules that petitioner engaged in contingent-fee personal injury claims on a large scale. Some idea of the extent of his contingent financial interest in such claims is indicated by the fact that between 1953 and the end of June 1960 he filed with



the Appellate Division 1062 contingent-fee retainer statements required to be filed by Rule 3 (R. 3-7; Exh. 1).<sup>2</sup>

But when petitioner was called upon to produce the records specified in the subpoena duces tecum—"pertaining to (his) business as an attorney" (R. 160; Exh. 11)—he refused on constitutional grounds and on advice of his counsel to produce any one of the required records (R. 59-60, 117-119). His first refusal on the ground that production of the records "may tend to incriminate or degrade (him) or to subject (him) to some penalty or forfeiture" (R. 60) was interposed on June 26, 1959 (R. 47), which was before this Court decided the case of *Cohen v. Hurley*, 366 U.S. 117 (1961), rehearing denied 374 U.S. 857 (1963), second petition for rehearing denied 379 U.S. 870 (1964).

After this Court's decision in the *Cohen* case petitioner wrote a letter to the Justice presiding at the Judicial Inquiry, dated July 6, 1961, which was forwarded by his counsel (R. 147-148, Exh. 4). The letter reads as follows:

"Sir:

In view of the recent decision by the Supreme Court in the *Cohen* matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before your Honor, during the course of the Judicial Inquiry, which I then asserted in good faith, upon the advice of counsel, and in the sincere belief that I then had the right to do so.

I am willing to testify and answer questions concerning relevant matters.

Respectfully yours,

(Signed) SAMUEL SPEVACK"

---

2. Petitioner's subsequent retainer statements were required to be filed with the Judicial Conference of the State of New York. See note 1, *supra*.

Thereafter petitioner's counsel obtained two adjournments upon the representation that whatever records called for by the subpoena were available would be produced (R. 76-90). Petitioner then retained new counsel who requested a further adjournment and represented:

"The Court: How about the production of the records, counsel?

Mr. Shatzkin: If your Honor please, we intend to produce the records called for by the subpoena. We had made all those arrangements on Friday. We intended producing them here this morning" (R. 97).

Relying thereon, the court granted an adjournment to December 4, 1961 (R. 97-98). But on the adjourned date petitioner did not appear. His counsel requested a further adjournment (R. 100-101) and indicated that petitioner may have changed his mind and might refuse to comply with the subpoena (R. 103-104). The court then granted another adjournment to January 10, 1962 (R. 105).

Finally, on the adjourned date petitioner appeared with his counsel, but not with the records. Instead, an application was made for a still further adjournment. This time the court denied the request and directed that the record be produced (R. 106-113).

Thereupon petitioner's counsel informed the court that he had advised "in the event" a further adjournment were denied, petitioner should "assert all of his constitutional privileges under the Constitution of the United States and under the Constitution of the State of New York" (R. 113-114). When the court refused to change its decision, petitioner was called to the witness stand. In view of his written request to the court, above quoted, he was asked whether

he wished to withdraw his prior claim of privilege. His reply was that upon the advice of counsel he was:

"obliged not to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty" (R. 117).

Faced with this refusal, the examiner asked not a single question other than whether petitioner refused to produce each of the records specified in the subpoena (R. 118-119). And when petitioner reiterated his claim of privilege as to each of the records, he was told that disciplinary proceedings would be instituted (R. 134-135).

Thus, the case does not rest upon petitioner's refusal to answer questions which might tend to incriminate him, but rather upon his refusal to produce any of the records required by law to be kept as a condition for his engaging in contingent-fee practice, and upon his blanket refusal to answer any questions which might be asked in relation thereto.<sup>3</sup>

### 3.

In affirming the order of disbarment the New York Court of Appeals rendered a memorandum decision in which it held (16 N Y 2d 1048, 1050):

"Order affirmed on the authority of *Cohen v. Hurley* (366 U.S. 117) and on the further ground

3. At the disciplinary proceeding petitioner again refused to answer questions which might be put to him. He acknowledged that he was the respondent in the proceeding and that he was admitted to the bar, but on being asked whether after his admission he engaged in the practice of law he refused on constitutional grounds "to answer any questions other than that which I have already answered" (R. 164-16).



that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U.S. 582; *Shapiro v. United States*, 335 U.S. 1)."

Thereafter the Court amended its remittitur which reads as follows (App. D of Pet.):

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights."

### ARGUMENT

Petitioner asserts that his disbarment "was based upon invocation of his privilege under the Fifth Amendment" (Pet. p. 9), that he was disbarred "for his refusal to relinquish his privilege against self-incrimination" (Pet. p. 11) and for his refusal "to answer questions" which might tend to incriminate him (Pet. pp. 17-18).

These assertions ignore the actual basis upon which the order of disbarment was affirmed by the New York Court of Appeals, whose decision petitioner seeks to have reviewed. As shown by the Court of Appeal's memorandum-decision



and amended remittitur, the basis for the affirmance is that petitioner has no Fifth Amendment right to refuse to produce "records required by law to be kept by him (*Davis v. United States*, 326 U.S. 582; *Shapiro v. United States*, 335 U.S. 1)" or to interpose a blanket refusal "to answer any questions which might be asked relating thereto."

This factual and legal basis upon which the affirmance of the order of disbarment rests is not in conflict with the decision in *Malloy v. Hogan*, 378 U.S. 1, or with the applicable federal law defining the reach of the Fifth Amendment privilege against self-incrimination. Indeed, after extended argument on peripheral matters (Pet. pp. 6-16), petitioner finds it necessary to contend that this Court's decision in *Shapiro v. United States*, *supra*, "is no longer valid" and that the required records doctrine of the case should be "reconsidered and rejected" as "an unwarranted limitation upon the scope of the privilege" (Pet. pp. 18, 20).

Thus, in effect, on the crucial issue of the case petitioner is seeking certiorari upon the contention that the New York Court of Appeals erred by following this Court's mandate requiring the States to apply the federal standards of Fifth Amendment privilege against self-incrimination. See *Malloy v. Hogan*, *supra*, at p. 11.

Surely, this does not present a federal question.

Nor is there any merit to petitioner's further contention that he had a constitutional right to refuse "to answer questions" (Pet. p. 17). The fact is that he was never asked a single question other than whether he refused to produce the required records. His blanket refusal "to answer any questions in relation thereto" (B. 117) does not cloak him

with constitutional privilege. The federal privilege of a witness against self-incrimination may not be asserted in advance of specific questions actually propounded, the answer to which might tend to incriminate him. *Hoffman v. United States*, 341 U.S. 479; *McPhaul v. United States*, 364 U.S. 372; *United States v. Harmon*, 339 F. 2d 354, 359, cert. denied, 380 U.S. 944.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SOLOMON A. KLEIN  
Respondent, Attorney Pro Se

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## **APPENDIX**

### ***United States Constitution, Amendment V***

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

### ***United States Constitution, Amendment XIV***

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

### ***Section 90 of New York Judiciary Law***

1. . . .

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . . or any conduct prejudicial to the administration of justice. . . .

### ***Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department***

**Rule 2. Penalty.** An attorney who violates any of these special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision two of section 90 of the Judiciary Law.

**Rule 3. Statements as to retainers in actions or claims arising from personal injuries.** . . . Every attorney who, in connection with any action or claim for damages for personal injuries . . . accepts a retainer or enters into an agreement, express or implied, for compensation for serv-



*Appendix*

ices rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury. . . .

*Rule 4. Deposit of collections-notice.* Where an attorney who has accepted a retainer or entered into an agreement as referred to in the preceding rule, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a bank or trust company in a special account, separate from his own personal account and shall not commingle the same with his own funds. Within ten days after the receipt of any such sum he shall cause to be delivered personally to such client or sent by registered mail, addressed to such client at the client's last known address, a statement in writing setting forth the amount received, the date when and the name of the person from whom he received the same, and the amount which he claims to be due for his services and disbursements, specifying the same separately. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1965

No. 944

62

SAMUEL SPEVACK, *Petitioner,*

v.

SOLOMON A. KLEIN, *Respondent.*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

LAWRENCE J. LATTO

WILLIAM H. DEMPSEY, JR.

MARTIN J. FLYNN

734 Fifteenth Street, N.W.

Washington, D. C. 20005

*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATEKIN

235 East 42nd Street

New York 17, New York

SHRA & GARDNER

734 Fifteenth Street, N.W.

Washington, D. C. 20005



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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1965**

No. 944

**SAMUEL SPEVACK, Petitioner,**

v.

**SOLOMON A. KLEIN, Respondent.**

**PETITIONER'S REPLY TO BRIEF IN OPPOSITION**

1

Respondent devotes two pages of his brief (pp. 6-7) to setting forth petitioner's July 6, 1961 letter to the Presiding Justice of the Judicial Inquiry indicating his intention, in light of this Court's decision in *Cohen v. Hurley*, 366 U.S. 117, to withdraw his claim of the privilege against self-incrimination, and to petitioner's counsel's subsequent equivocal statements to the Inquiry as to whether petitioner would continue to claim the privilege. We are unable to understand the significance of respondent's inclusion of that material, any more than could the Presiding Justice when the letter was offered in evidence near the conclusion of the proceedings in the Inquiry (R. 124-28). If the implication is intended that petitioner either failed adequately to claim the privilege or waived the privilege, however, that

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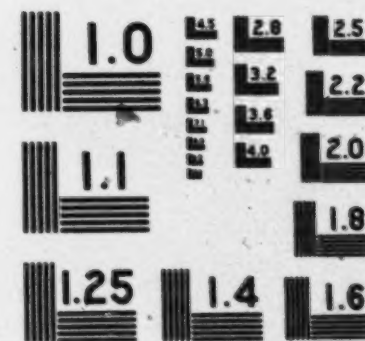
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implication would be flatly inconsistent with the findings of the Referee and wholly devoid of support in any of the courts below. The Referee specifically found that petitioner refused to answer questions or produce records under a claim of the privilege against self-incrimination (Ref. Rept. 22), that there was no evidence "that the privilege was invoked more extensively than reasonably required to protect [petitioner] against incrimination (*Id.*, at 10)," and that the Inquiry was neither misled nor prejudiced by the letter or statements of petitioner and his counsel (*Id.*, at 19-20). Neither the opinion of the Appellate Division nor the order or amended remittitur of the Court of Appeals suggests anything to the contrary, and, indeed, the opinion of the Appellate Division established that petitioner's claim of privilege was sufficient to preclude the State from compelling him either to testify or to produce records, though it also held that petitioner's election to claim the privilege must result in his disbarment.

Respondent also contends that this case does not present the issue of whether a state may adopt the doctrine that a lawyer who validly invokes the Fifth Amendment's privilege against self-incrimination must automatically be disbarred. Respondent asserts that the New York Court of Appeals held only that petitioner was disbarred because he refused to produce records and "interposed a blanket refusal 'to answer any questions which might be asked relating thereto'" (Br. in Op., p. 10), and that the Fifth Amendment gave him no privilege whatever to do either. The record and the opinions of the New York courts cannot conceivably be strained far enough to support this contention.

On the first day of the proceedings before the Judicial



Inquiry, counsel for the Inquiry advised petitioner that he would be called upon to testify (R. 18). He was subsequently sworn as a witness (R. 52) and asked whether he had produced the documents called for in the subpoena, and, if not, why he had failed to do so (R. 59). Petitioner claimed his privilege against self-incrimination (R. 60-61), but the court, insisting that the basis for refusal must be clear, stated,

"I want to know whether, assuming they were here, and assuming reference was made to them by counsel, and questions asked with respect to them, whether the witness's answer would be a refusal upon the basis that his answer might tend to incriminate him (R. 70)."

Petitioner replied in the affirmative, and the court stated that "you have a perfect right to plead that constitutional privilege. That is my opinion (R. 71)."

The proceedings were adjourned pending this Court's decision in the *Cohen* test case, after which decision counsel for the Inquiry wrote petitioner that he was to appear before the Inquiry to produce his records and to testify concerning those records (R. 77). Petitioner's counsel appeared for him and was advised that petitioner should appear, produce the records, "take the stand," "explain the absence of any other records," and discuss each item called for in the subpoena (R. 79). Petitioner appeared and was sworn, but he refused to produce the records or answer questions concerning them under a claim of his privilege against self-incrimination and on other federal constitutional grounds (R. 117-18). He maintained that position in response to questions about each item called for in the subpoena (R. 118-19).

Thus, the record establishes that petitioner was asked not only to produce records but also to answer questions,

Even if the only testimony sought by the State concerned the whereabouts of non-produced records, and even if petitioner were not privileged to refuse to produce records, it is thoroughly settled that the testimonial privilege would apply. See *Curcio v. United States*, 354 U.S. 118, 128.

Respondent's petition to the Appellate Division asking that petitioner be disciplined charged him with misconduct in his "refusal to answer questions . . . ." (Petition of Solomon A. Klein, p. 4). The Referee found that petitioner "refused to produce such records or answer any questions in relation thereto . . . ." (Ref. Rept., p. 22). The Appellate Division ordered his disbarment "on the basis of the Referee's unchallenged finding that [he] refused to testify and produce his records . . . ." (Petition for Certiorari, App. A, p. 32). The Court of Appeals affirmed "on the authority of *Cohen v. Hurley* . . ." and also "on the further ground . . ." that there is no privilege under the Fifth Amendment to refuse to produce records that are required by law to be kept. (Petition for Certiorari, App. C). Surely if the Court of Appeals had concluded that petitioner's refusal to answer questions was not properly based upon the Fifth Amendment it would have said so and would not have put its primary reliance upon *Cohen*, which held that disbarment was permissible even when a state privilege against self-incrimination was validly invoked.

Indeed, if after the Judicial Inquiry and the Appellate Division had both unequivocally recognized that petitioner had a constitutional privilege to refuse to answer questions, and had validly asserted the privilege, respondent were to be permitted to rewrite the Memorandum Opinion of the Court of Appeals in the manner he has suggested this case would call simply for summary reversal under the doctrine of *Raley v. Ohio*, 360 U.S. 423. The important constitutional

issues raised by the petition, however, cannot be so easily obliterated.

Respectfully submitted,

LAWRENCE J. LATTO

WILLIAM H. DEMPSEY, JR.

MARTIN J. FLYNN

734 Fifteenth Street, N.W.

Washington, D. C. 20005

*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATZKIN

235 East 42nd Street

New York 17, New York

SHEA & GARDNER

734 Fifteenth Street, N.W.

Washington, D. C. 20005

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IN THE  
Supreme Court of the United States

October , 1966

No. 62

SAMUEL SPEVACK,

*Petitioner,*

*against*

SOLOMON A. KLEIN,

*Respondent.*

BRIEF OF NEW YORK STATE ASSOCIATION OF  
TRIAL LAWYERS AS AMICUS CURIAE.

HERMAN B. GERRINGER,  
165 Broadway,  
New York City.

Counsel for *New York State  
Association of Trial Lawyers,  
as Amicus Curiae.*

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IN THE

**Supreme Court of the United States**

October , 1966

No.

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SAMUEL SPEVACK,

*Petitioner,*

*against*

SOLOMON A. KLEIN,

*Respondent.*

---

**BRIEF OF NEW YORK STATE ASSOCIATION OF  
TRIAL LAWYERS AS AMICUS CURIAE**

---

**The Interest of the Amicus Curiae**

The New York State Association of Trial Lawyers is a self-governing bar association with a membership of 3500 New York lawyers who practice particularly in personal injury law. It is the New York affiliate of the American Trial Lawyers Association.

The *amicus curiae* believes that the judgment below seriously impairs the right to engage in the practice of law by depriving lawyers of an important constitutional right. The *amicus curiae* submits this brief with the consent of the attorneys for both parties.

**Statement of Facts**

Petitioner, a practicing attorney in New York for some forty years, was subpoenaed to appear with his books and records before a Judicial Inquiry ordered by the Appellate

Division of the Supreme Court of New York, Second Department. He appeared but refused to produce the records called for or to answer questions in relation thereto, relying on the privilege against self-incrimination provided by Article 1, Section 6, of the New York State Constitution and by the Fifth Amendment and the Fourteenth Amendment of the United States Constitution (R. 115-18).

Disciplinary proceedings were then filed charging misconduct in ten separate respects, including eight specific allegations relating to filing of retainer statements and handling of clients' funds, a ninth charge of obstructing the Inquiry and a tenth charge of misconduct for refusal to answer questions and to produce the records subpoenaed as aforesaid. At a hearing before a referee on these charges the eight specific charges were abandoned, the ninth was dismissed for failure of proof and the tenth was sustained on the referee's finding that petitioner had refused to testify and to produce records under constitutional privileges based upon the Fourth, Fifth and Fourteenth Amendments and upon relevant state constitutional privileges.

The Appellate Division entered a judgment disbaring petitioner for this refusal to testify and to produce records, relying upon *Cohen v. Hurley*, 366 U. S. 117, and holding that although an attorney has "an absolute right to invoke his constitutional privilege against self-incrimination" when he does so "he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently forfeit his privilege of remaining a member of the bar."

The Court of Appeals affirmed in a memorandum order without opinion on the authority of *Cohen* and on the further ground that the Fifth Amendment does not apply to the production of records as called for here.



## ARGUMENT

**Disbarment for asserting a constitutional privilege is a denial of due process even though it be designated a failure to co-operate with a judicial inquiry.**

Fairly summarized, the arguments of the respondent come down to the contention that lawyers engaged in "contingent fee practice" owe a special duty of co-operation with a judicial inquiry into such practice, a duty which is superior even to the constitutional privilege against self-incrimination. Respondent's repeated condescending references to "contingent fee" practitioners reveals perhaps, the true reason for the fervor with which he adheres to the unfounded and unsupportable assertion that the dignity and virtue of the bar cannot be preserved unless lawyers relinquish the great rights that the Constitution preserves for all citizens. Respondent, despite his protests to the contrary, is evidently of the view that it is basically unethical, or at least highly suspect, for a lawyer to have his fee payable only if his efforts are successful and measured, in that event, by a percentage of the amount recovered. But this view, were it to be accepted, would deprive a very large number of litigants in our country of effective legal representation. Nothing is more firmly settled under our judicial system than that the acceptance of contingent fee retainers by lawyers is not only wholly proper but is a social necessity. Perhaps this is particularly true at this time when legal representation for those financially unable otherwise to obtain it is of great concern to the organized bar.

On behalf of our membership we must express our shock and concern at the animus toward a substantial segment of the bar that pervades the respondent's pleadings and briefs in this action. We suggest that this subjective view is irrelevant to the issue and cannot be permitted to justify deny-

ing lawyers the privilege against self-incrimination and requiring them to give evidence against themselves, particularly in the absence of any showing that the means otherwise and already available for ensuring adherence to the ethical standards of the bar are not wholly adequate for this purpose.

Although both the Appellate Division and the Court of Appeals held that the disciplinary judgment here was based, not on the attorney's "absolute right to invoke his constitutional privilege" but rather on his failure "in his inherent duty to the court. . .", it seems clear enough that the actual question, as viewed by the Courts below, is the application of the privilege as it is affected by the special status of lawyers.

We leave for the petitioner the argument as to the application of the privilege as it pertains to the production of records here, a distinction apparently pressed by respondent.

The point made in *Cohen v. Hurley*, 7 N. Y. 2, 488, affirmed 366 U. S. 117, that lawyers have a "special position" which carries with it a duty of "loyal co-operation" in judicial investigations, it seems to us ignores the greater weight of constitutional right. So long as there exists the absolute protection of the Constitution, surely there can be no balancing of obligation over privilege, of a duty to co-operate over the right not to be compelled to incriminate oneself. If this be a right which by our history and most sacred tradition protects one accused of the most serious crime, can it be given in a diluted form to the lawyer called upon to produce all his financial records and to testify concerning them?

We may not overlook the fact that there was only one ground for the disbarment of the petitioner here, his claim of constitutional privilege. As Judge Fuld of the New York Court of Appeals noted in his dissent in *Cohen, supra*, "this fact cannot be altered or disguised by styling his con-

duct a 'refusal to cooperate with the court.' It is to substance that we must look, not to form or labels. The courts should not sanction so easy an avoidance of a constitutional guarantee of a fundamental personal right."

A judicial rule penalizing use of the privilege is as much a denial of due process as it was in *Slochower v. Board of Education*, 350 U. S. 551, where it resulted from legislative enactment.

As long ago as 1953, the Committee on Law Reform of the Association of the Bar of the City of New York opposed the enactment of a statute subjecting lawyers to disbarment proceedings if they refused to sign waivers when called to testify concerning their conduct as lawyers (Report No. 2029, April 22, 1953).

The effects of such an attack upon the Fifth Amendment privilege reach the independence of the bar. Lawyers who must choose between their constitutional rights and their license to practice law have, in effect, given up their rights. The profession of the law, the historic shield between man and his sovereign, is too valuable to be placed in jeopardy by such a choice. There are few professions and no occupations in which the consequences of occupational expulsion are so devastating. Public disgrace, loss of livelihood and expulsion from the profession which has constituted his life's work are the disbarred lawyer's fate. See *Bradley v. Fisher*, 13 Wall (80 U. S.) 335, 355.

This is not to question the desirability of the highest standards of behavior. There is nothing inconsistent in requiring both high standards of the professional man and strict proof and fair procedures of his prosecutors and judges. *Ex Parte Garland*, 4 Wall (71 U. S.) 333, 379; *Ex Parte Secombe*, 19 How. (60 U. S.) 9, 13.

This Court's decision in *Cohen* rested, in part at least, upon the unavailability of the Fifth Amendment's privilege

to a state court proceeding under the decisions as they then stood. Since then, the conclusion by the Court in *Malloy v. Hogan*, 378 U. S. 1, that the Fourteenth Amendment protects the assertion of the Fifth Amendment's privilege in state proceedings, gives the Court a new opportunity to remove the cloud from the privilege and to give reassurance to the entire bar of this country on the subject of the primacy of personal liberties, including those of lawyers, under our Constitution.

### CONCLUSION

**The judgment of disbarment should be reversed.**

Respectfully submitted,

**HERMAN B. GERRINGER,**

165 Broadway,

New York City.

Counsel for New York State

Association of Trial Lawyers,

as *Amicus Curiae*.



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SUPREME COURT, U. S.

IN THE  
**Supreme Court of the United States**

October Term, 1966

                      
No. **62**  
                    

SAMUEL SPEVACK,

*Petitioner,*

*against*

SOLOMON A. KLEIN,

*Respondent.*

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**BRIEF OF NEW YORK CITY CHAPTER OF NA-  
TIONAL LAWYERS GUILD AS AMICUS CURIAE**

---

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RALPH SHAPIRO,  
*Counsel for New York City Chapter of  
National Lawyers Guild as Amicus Curiae,*  
9 East 40th Street,  
New York, New York.

JONATHAN W. LUBELL AND DAVID G. LUBELL,  
165 Broadway,  
New York, New York,  
*of Counsel.*

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IN THE  
**Supreme Court of the United States**

October Term, 1966

No. \_\_\_\_\_

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SAMUEL SPEVACK,

*Petitioner,*

*against*

SOLOMON A. KLEIN,

*Respondent.*

---

**BRIEF OF NEW YORK CITY CHAPTER OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE**

---

**The Interest of the *Amicus Curiae***

The National Lawyers Guild is a national bar association, deeply interested in the rules and standards governing the practice of law in the United States and in the preservation of the freedoms guaranteed by the Bill of Rights. The manner in which the rules governing the practice of law in the State of New York affects the constitutional rights of New York attorneys is of particular concern to the New York City Chapter of the National Lawyers Guild. *Amicus Curiae* submits this brief with the consent of both parties.

*Amicus Curiae* believes the decision appealed from presents far reaching issues concerning the Fifth Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment. The Guild believes not only that the decision appealed from limits the protection of the privilege against self-incrimination in a way never

intended by the framers of the Constitution, but also that it threatens the freedom and independence of the bar at a time in our nation's history when the legal profession, long-honored, is assuming a role of still greater social importance.

## ARGUMENT

### POINT I

**The disbarment of petitioner for exercising his privilege against self-incrimination violates the Fifth Amendment to the Constitution made applicable to the states by the Fourteenth Amendment.**

The controlling facts herein may be briefly stated. Petitioner appeals from a judgment of the New York Court of Appeals affirming an order of the Appellate Division, Second Department, disbarring him and striking his name from the role of attorneys and counselors at law in the State of New York. The sole basis for petitioner's disbarment was his refusal to testify and produce records before a judicial inquiry into his alleged professional misconduct. Petitioner asserted his constitutional privilege against compulsory self-incrimination under the Fifth and Fourteenth Amendments as the justification for his refusal.

The Fifth Amendment's privilege against compulsory self-incrimination is protected by the Fourteenth Amendment as against abridgment by the States. *Malloy v. Hogan*, 378 U. S. 1 (1964). The standard for determining what action by the State amounts to compulsion was stated only last year in *Griffin v. California*, 380 U. S. 609 (1965). Petitioner had been convicted after a trial during which the court had commented on his failure to testify. In reversing on the ground that petitioner's Fifth Amendment privilege as applied to the States by the Fourteenth Amendment was



thereby violated, the Supreme Court said of the practice of commenting on an accused's failure to testify: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U. S. 609, 614. If comment by a trial court meets the "costliness" test of *Griffin v. California*, then, clearly, the disbarment of petitioner in the instant case, depriving him of his profession and livelihood, meets the "costliness" test. As Mr. Justice Douglas has said, "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so." *Cohen v. Hurley*, 366 U. S. 117, 153-54 (1961) (dissenting opinion).<sup>\*</sup> See also Mr. Justice Black's dissent in *Cohen v. Hurley*, 366 U. S. 117, 147-48.

Respondent's argument that the ground of petitioner's disbarment was not his exercise of his constitutional right but rather his alleged failure to cooperate with a judicial inquiry relies upon a synthetic appearance rather than the substance of reality. To recognize a constitutional right in theory while in fact withholding the benefits the Founding Fathers intended it to secure is the very thing the Supreme Court in *Mapp v. Ohio*, 367 U. S. 643 (1961), said the States may not do. The Court in *Mapp* said, "to hold otherwise

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<sup>\*</sup> In *Cohen v. Hurley*, *supra*, the majority of the Court did not consider the protection afforded by the Fifth Amendment privilege against self-incrimination in the present type of proceeding because of the then prevailing rule that the federal constitutional privilege was not available in a State proceeding. The subsequent decision of this Court in *Malloy v. Hogan*, *supra*, which overturned the rule barring the application of the federal privilege in a State proceeding, results in the Court being squarely presented in the instant case with the grave constitutional issues arising from the disbarment of an attorney because of his use of the federal constitutional privilege in a State disciplinary proceeding.

is to grant the right *but in reality to withhold its privilege and enjoyment.*" 367 U. S. 643, 656 (emphasis added).\*

The Fifth Amendment was intended as a shield to protect the citizen from the inquisitorial practice of compulsory self-incrimination. The court below considered petitioner's wielding of this constitutional shield to be a refusal to cooperate with a judicial inquiry. The wielding of any shield may be characterized as a failure to cooperate with the one attempting to reach him whom the shield protects. However, this "failure to cooperate" can in no way justify an impairment of the protection afforded by the constitutional privilege against self-incrimination. As stated by Mr. Justice Frankfurter:

"The Founders of the Nation were not naive or disregardful of the interests of justice. The difference between them and those who deem the privilege an obstruction to due inquiry has been appropriately indicated by Chief Judge Magruder:

'Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has

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\* While the Court in *Mapp* was speaking of the right guaranteed by the Fourth Amendment to be free from unlawful searches and seizures, in the paragraph immediately following the cited one the Court noted the close relationship of the Fourth and Fifth Amendments:

"We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle,' *Bram v. United States*, 168 U. S. 532, 543-544 (1897). They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.' *Feldman v. United States*, 322 U. S. 487, 489-490 (1944)." *Mapp v. Ohio*, 367 U. S. 643, 656-57 (1961) (footnote omitted).

been largely forgotten to-day. . . . They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application. . . .” *Ullmann v. United States*, 350 U. S. 422, 427 (1956).

The privilege against self-incrimination is, in the words of Dean Erwin N. Griswold of the Harvard Law School, “one of the great landmarks in man’s struggle to make himself civilized.” Griswold, *The Fifth Amendment Today* 7 (1955), and its protection should not be limited by a narrow application, as the court below has done. Rather, the full force of the Fifth Amendment should be recognized so that it provides the protection against governmental incursions into areas of individual privacy that the Founding Fathers intended it to have. Mr. Justice Frankfurter’s effort “. . . to define explicitly the spirit in which the Fifth Amendment’s privilege against self-incrimination should be approached,” resulted in the conclusion that “this constitutional protection must not be interpreted in a hostile or niggardly spirit.” *Ullmann v. United States*, 350 U. S. 422, 426 (1956).

What the Supreme Court said in *Mapp* in applying the exclusionary rule regarding the use in State proceedings of evidence seized in violation of the Fourth Amendment is applicable to restrictive interpretations of the Fifth Amendment as well:

“Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual

charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a 'freedom' implicit in the concept of ordered liberty.' " 367 U. S. 643, 655.

In *Mapp* this Court rejected an approach to a sacred right which the Court found had reduced that right to a valueless form of words. Similarly, herein, to preserve the value of the Fifth Amendment, the Court is respectfully urged to reject an approach which would recognize the privilege against self-incrimination in a wholly formalistic manner while withholding its substantive protection.

## POINT II

**Respondent's constitutional privilege against self-incrimination is not limited because of his status as a member of the bar.**

The Fifth Amendment's privilege against self-incrimination is guaranteed equally to all persons, and petitioner is not afforded less protection because he is a member of the bar. Mr. Justice Brennan noted this point in his dissent in *Cohen v. Hurley*, 366 U. S. 117 (1961), a pre-*Malloy* case, which, as does the case at bar, involved the disbarment of an attorney for invoking his constitutional privilege against self-incrimination. Mr. Justice Brennan wrote: "I would hold that the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment. In that view the protection it affords the individual, *lawyer or not*, against the State, has the same scope as that against the National Government. . . ." 366 U. S. 117, 160 (emphasis added).\*

\* Mr. Justice Brennan is the author of the subsequent decision of this Court in *Malloy v. Hogan*, 378 U. S. 1 (1964).



Respondent cites the State's need to supervise the professional conduct of attorneys as an interest which respondent would treat as superior to petitioner's constitutional right not to be compelled to incriminate himself. Although the State's need to regulate the practices of its bar cannot be gainsaid, the real issue is whether the State may perform its supervisory function in such a manner as to vitiate the system of justice and protection of individual rights as enunciated by the Founding Fathers in the Bill of Rights. As Mr. Justice Frankfurter wrote for the Court in *Rogers v. Richmond*, 365 U. S. 534, 541 (1961), "... ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." In *Sheiner v. State*, 82 So. 2d 657 (1955), which like the instant case, involved the disbarment of an attorney who had used his Fifth Amendment privilege, Justice Floyd of the Florida Supreme Court stated in a concurring opinion:

"The State has charged or alleged certain conduct of appellant to be inimical to the best interests of the profession and his country. Witnesses are apparently available to sustain these allegations. If not, investigative weapons are certainly available to the State Attorney by which a 'case' may be made. . . . If the appellant has manifested a want of fidelity to the system of lawful government which he has sworn to uphold and preserve, let it be shown by a 'preponderance of the evidence' in what has come to be known . . . as the American way. . . ." 82 So. 2d 657, 666.

Similarly Mr. Justice Black dissenting in *Cohen v. Hurley* found that in disbarment proceedings the accused is entitled to the same constitutional rights and procedural safeguards as are enjoyed by lay persons:

"... [P]etitioner is entitled to every presumption of innocence until and unless such a violation

has been charged and proved in a proceeding in which he, like other citizens, is accorded the protection of all the safeguards guaranteed by the requirements of equal protection and due process of law. This belief that lawyers too are entitled to due process and equal protection of the laws will not, I hope, be regarded as too new or too novel." 366 U. S. 117, 149.

Most recently in *Miranda v. Arizona*, — U. S. —, 86 Sup. Ct. 1602 (1966), the Supreme Court resisted an attempt to limit the Fifth Amendment's protection where the State has a countervailing interest. Responding to the "recurrent argument" that "society's need for interrogation outweighs the privilege [against self-incrimination]," — U. S. —, 86 Sup. Ct. 1602, 1630, the Court firmly stated its position that "... the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." — U. S. —, 86 Sup. Ct. 1602, 1630.

But respondent contends that, because the practice of law is in some sense a "privilege," one who wishes to enjoy that privilege by maintaining his membership in the bar must be prepared to sacrifice some of the freedoms and protections guaranteed to all persons by the Bill of Rights, freedoms and protections won only after a centuries-long process of civilizing society. It is ironic that a committee of the Bar seeks herein to deprive an attorney of a basic constitutional right which the bar, in its dedication to our system of justice, must not only recognize but honor and zealously protect.

The courts and bar associations are duly concerned with preventing unethical practices by members of the bar. However, the superintending of the professional behavior of lawyers cannot be done in a manner such that the Bill of

Rights is denied its full and proper scope. This is especially important in regard to the Fifth Amendment's privilege against self-incrimination, the invocation of which is still regarded by a large element of the public as a badge of dishonor. See Mr. Justice Douglas dissenting in *Cohen v. Hurley*, 366 U. S. 117, 152 (1961). The courts have an important educative role to fulfill in this area. In the words of Mr. Justice Brandeis' clairvoyant dissent in *Olmstead*, "our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U. S. 438, 485 (1928). Yet the example of government in the instant case, limiting the efficacy of the privilege against self-incrimination by asserting that the ground for petitioner's disbarment is non-cooperation with a judicial inquiry, is not calculated to give the public an understanding of the Fifth Amendment as a protection to which there is a right of recourse not only for the guilty but also for the innocent. On the contrary the very opposite misapprehension of the privilege is fostered by respondent's actions. Mr. Justice Frankfurter's description of the general attitude in our society toward the privilege against self-incrimination is pertinent herein:

"This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann v. United States*, 350 U. S. 422, 426-27 (1956) (footnote omitted; emphasis added).

Rather than regarding the "privilege" to practice law as a reason for limiting the Fifth Amendment rights of lawyers, the influential role of lawyers in our society makes

it imperative that they not be trammelled in their important work by limitations on their rights. This view was forcefully expressed in his *Cohen* dissent by Mr. Justice Black, whose view in *Cohen* that the Fourteenth Amendment made the Fifth Amendment controlling on the States was subsequently adopted by the Court in *Malloy*. Mr. Justice Black wrote:

"I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence." *Cohen v. Hurley*, 366 U. S. 117, 138 (1961).

As sharp as these words were when Mr. Justice Black wrote them, developments subsequent to the *Cohen* case have given them an even greater poignancy. The landmark decisions of *Gideon v. Wainwright*, 372 U. S. 335 (1963), *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415 (1963), and *Brotherhood of Railroad Trainmen v. Virginia*, 377 U. S. 1 (1964), and the commitment of the national government to eradicate poverty in our land have multiplied the already great responsi-



bilities of the legal profession. *Gideon* and its aftermath, *Douglas v. California*, 372 U. S. 353 (1963), *Massiah v. United States*, 377 U. S. 201 (1964), *Escobedo v. Illinois*, 378 U. S. 478 (1964), and *Miranda v. Arizona*, — U. S. —, 86 Sup. Ct. 1602 (1966), which made the provision of counsel for indigent defendants in all criminal cases mandatory upon the States and which made this right to counsel meaningful by holding that the right exists at the earliest part of the criminal proceedings, not only increased the need for lawyers but also put a premium on the stoutness of heart of the American bar, for championing the unpopular cause of the criminal defendant often subjects the lawyer to public disrepute. Both the ability and desire of the lawyer to render services in these new, important areas will be affected by whether he is entitled to the privilege not to be a witness against himself, or whether he is subject to disbarment proceedings if he remains silent at a judicial inquiry.

In the area of civil litigation recognition of the need of the poor for legal services is beginning to develop.\* The conventional techniques of the bar in providing legal services and the traditional notion of the lawyer-client relationship may have to be altered in dealing with the very special problems of the poor, and new approaches such as neighborhood law offices and group legal services are being tried.

The present age of necessary experimentation and innovation in the effort to meet the legal profession's responsibilities as enunciated by the decisions of this Court and as recognized by national policy embodied in the anti-

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\* See for example the perceptive article by Edgar S. and Jean C. Cahn, "The War on Poverty: A Civilian Perspective," 73 Yale L. J. 1317-52 (1964). See also Cohen, "Law, Lawyers, and Poverty" in 43 Texas L. Rev. 1072-93 (1963) and Carlin and Howard, "Legal Representation and Class Justice" in 12 U. C. L. A. L. Rev. 381-437 (1965).

poverty program supplies the modern framework in which the independence nurtured by the protection of the Fifth Amendment privilege becomes even more important. The doctrine that a lawyer's Fifth Amendment rights are limited, wrote Mr. Justice Black, "... can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence." *Cohen v. Hurley*, 366 U. S. 117, 135 (1961) (dissenting opinion).

### CONCLUSION

**The judgment disbarring petitioner should be reversed.**

Respectfully submitted,

**RALPH SHAPIRO,**

*Counsel for New York City Chapter of  
National Lawyers Guild as Amicus Curiae.*

**JONATHAN W. LUBELL AND DAVID G. LUBELL,**

**165 Broadway,  
New York, New York,  
of Counsel.**

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK, *Petitioner,*

*v.*

SOLOMON A. KLEIN, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE  
OF NEW YORK

BRIEF FOR PETITIONER

LAWRENCE J. LATTO  
WILLIAM H. DEMPSEY, JR.  
MARTIN J. FLYNN  
734 Fifteenth Street, N. W.  
Washington, D. C. 20005  
*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATEKIN  
235 East 42nd Street  
New York 17, New York

SHEA & GARDNER  
734 Fifteenth Street, N. W.  
Washington D. C. 20005

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK, *Petitioner,*

v.

SOLOMON A. KLEIN, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE  
OF NEW YORK

**BRIEF FOR PETITIONER**

**Opinions Below**

The opinion of the Appellate Division of the Supreme Court of New York is reported at 24 App. Div. 2d 653. The memorandum order of the Court of Appeals, affirming the order of the Appellate Division, is reported at 16 N.Y. 2d 1048, 213 N.E. 2d 457. The order of the Court of Appeals amending its remittitur is reported at 17 N.Y. 2d 490, 214 N.E. 2d 373.

### **Jurisdiction**

The judgment of the Court of Appeals was entered on December 1, 1965, and, on December 13, 1965, Mr. Justice Harlan entered a stay of the order of the Appellate Division conditioned upon the filing of a petition for certiorari on or before January 24, 1966. The petition was filed on January 24, 1966, and was granted on March 21, 1966. 382 U.S. 942. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

### **Questions Presented**

1. Is the disbarment of an attorney, solely because of his refusal, based upon a good faith claim of the privilege against self-incrimination, to testify and to produce records before a State Judicial Inquiry, in violation of the self-incrimination clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment?

2. Assuming the Fifth Amendment standard does not of itself preclude the disbarment of an attorney under such circumstances, is the disbarment nonetheless arbitrary or discriminatory action prohibited by the due process or equal protection clauses of the Fourteenth Amendment?

3. May the protection of the self-incrimination clause of the Fifth Amendment be removed from the financial records of an attorney by a broad State regulation requiring that certain records be kept by attorneys?

### **Statutes Involved**

The Fifth and Fourteenth Amendments to the Constitution of the United States provide, in pertinent part, as follows:

#### **Fifth Amendment**

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."



### Fourteenth Amendment

"Section 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 5 of the Special Rules of the Second Department, Appellate Division of the Supreme Court of the State of New York Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department, provided as follows:<sup>1</sup>

"Preservation of Records of Actions, Claims and Proceedings. In every action, claim and proceeding of the nature described in rule three [personal injury, property damage or condemnation claims involving contingent fee compensation], attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought."

### Statement

In January 1957 the Appellate Division of the Supreme Court of New York, Second Department, in response to a petition of the Brooklyn Bar Association, ordered a Judicial Inquiry into alleged unethical practices relating to the representation of clients on a contingent-fee basis. The nature and procedures of the Judicial Inquiry have been described

<sup>1</sup> Rule 5 was amended and renumbered as Special Rule IV(6) in 1961. See Civil Practice Annual of New York 9-26 (1965).

in this Court's opinions in *Anonymous v. Baker*, 360 U.S. 287, and *Cohen v. Hurley*, 366 U.S. 117. Generally, as the *Baker* and *Cohen* cases indicate, the Judicial Inquiry proceeded by serving subpoenas upon attorneys and other persons requiring their testimony and/or production of records, and examination of witnesses was conducted in secret and with attendance of counsel permitted only at the discretion of the presiding Justice.

For a number of years, the Second Department of the Appellate Division has had special rules regulating the conduct of attorneys who practice in personal injury, property damage and certain other types of actions under contingent fee arrangements. Among other things, the rules require the filing by such attorneys of statements of retainer setting forth the details of such arrangements<sup>2</sup> and the

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<sup>2</sup> "Statements as to Retainers in Actions or Claims Arising from Personal Injuries or Property Damage and in Condemnation or Change of Grade Proceedings—Blank Retainers. Every attorney who, in connection with any action or claim for damages for personal injuries or for property damage or for death or loss of services resulting from personal injuries, or in connection with any claim in condemnation or change of grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury or damage or the title and description of the condemnation or change of grade proceeding, the date it was commenced and the number or other designation of the parcels affected.

"If the action or claim arises from personal injuries or property damage, it shall also be stated whether or not the client was personally known to the attorney prior to the date of injury or property damage, the name and address of any person or persons who referred the client to the attorney or who had any connection with referring the client

preservation for a five-year period of "the pleadings, records and other papers pertaining to such action . . . , and also all data and memoranda of the disposition thereof . . . . [Rule 5]"

Petitioner has been an attorney in Kings County since his admission to the bar in 1926, practicing primarily in actions covered by the terms of the special rules. Pursuant to those rules, during the years 1953 to 1959, petitioner filed over 1000 statements of retainer (R. 12). On June 2, 1958, a subpoena issued calling for petitioner to appear before the Judicial Inquiry and to produce records generally described as pertaining to his business as an attorney but specifically including such items as his check book stubs, cancelled checks, savings account pass books, records of all loans from financial institutions and others, and state and federal tax returns (R. 1-2).<sup>8</sup> Petitioner's motion to quash

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to the attorney, stating the connection. This shall be stated if the attorney was retained or associated in any way in five or more claims made or actions instituted in the previous calendar year for personal injuries, property damage or both.

"Such statements may be filed personally by the attorney or his representative, or by registered mail. Such statements may also be filed by ordinary mail, provided the statements are accompanied by a self-addressed stamped return postal card containing the date of the retainer and the name of the client. The postal card will be signed by the clerk of the court and mailed to the attorney; and it will serve as a receipt for the filing of the statement of retainer.

"No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney is left in blank at the time of its execution."

<sup>8</sup> The record does not reflect the Judicial Inquiry's reason for including petitioner as a witness before it. The Presiding Justice stated that there were no charges against him (R. 41), and counsel for the Inquiry stated that the Inquiry's examinations of records on various occasions resulted in no finding of wrongdoing, but "if we do find anything that is improper or anything that proves a point, then and only then do we offer [records] in evidence [R. 37]."

In light of the interest of respondent in the number of statements of retainer filed by petitioner (R. 12; Brief in Opposition to Petition for Certiorari, pp. 2-3), and in the absence of any other reason appearing in



the subpoena was denied, *Anonymous v. Arkwright*, 7 App. Div. 2d 874, 181 N.Y.S. 2d 784, *leave to appeal denied*, 5 N.Y. 2d 710, *cert. denied*, 359 U.S. 1009, and he appeared before the Judicial Inquiry and was sworn as a witness (R. 26). The Presiding Justice had refused permission for observers to be present, since the Inquiry was a "secret investigation," but he did grant the request of petitioner's counsel that he be permitted to remain during petitioner's questioning (R. 22, 25).

Though petitioner was sworn as a witness, he advised the Presiding Justice that, in view of possible tax or other problems and in view of the Court's inability to grant him immunity, he refused to produce his records or to answer questions under a claim of the privilege against self-incrimination (R. 29-32). The Presiding Justice stated his "opinion" that petitioner had "a perfect right to plead that constitutional privilege" but called attention to the fact that a "test case" was being prepared by the Inquiry on the theory that "such a plea, made in the context of this Inquiry, might be indicative of such a lack of candor . . . as to warrant disciplinary proceedings based upon that ground alone [R. 30]." Therefore, the Presiding Justice determined that no further proceedings would be held in petitioner's case until the final disposition of that test case (R. 33-34).

The test case, *Cohen v. Hurley*, 366 U.S. 117, was decided by this Court in April, 1961. In July of that year petitioner wrote the Presiding Justice of the Inquiry that, in view of the decision in *Cohen*, he wished to withdraw his claim of privilege (R. 52). Shortly thereafter he retained new counsel, and, after further adjournments of the hearing, he appeared before the Inquiry, was recalled to the witness

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the record, it is a fair inference that petitioner was called before the Inquiry principally as a result of his extensive practice, as was the case in *Cohen v. Hurley*, 366 U.S. 117, 119-20.



stand and was asked if he did wish to withdraw his claim of privilege, as indicated in his letter. Petitioner replied that, upon the advice of his new counsel, he continued to claim his privilege against self-incrimination under the Fifth and Fourteenth Amendments, and also under Article 1, Section 6 of the State Constitution. He also stated his reliance upon the standard of fundamental fairness of the due process clause of the Fourteenth Amendment and upon the equal protection clause of that Amendment. (R. 42-43).<sup>4</sup>

In response to questions by the attorney for the Inquiry as to the specific documents included in the subpoena, petitioner persisted in his decision "not to produce any of the records or to answer any questions in relation thereto [R. 43]." Counsel for the Inquiry previously had stated that he wished to proceed, "as we do in all cases, to have [petitioner] come in, take the stand and produce [the records], and we can then mark them for identification. Then he can explain the absence of any other records. We can go through the subpoena piecemeal with him [R. 36]." Petitioner's counsel advised counsel for the Inquiry, however, that he did not wish to place petitioner "in the position that it may ever be urged that he opened the door by answering these questions" and that, unless he could be assured that no such position would be taken by the Inquiry, he would advise petitioner to answer no further questions (R. 47). No such assurance was given and the questioning was discontinued.

At no time during the hearings before the Judicial Inquiry did either the Presiding Justice or counsel for the Inquiry contend that the privilege against self-incrimination was not applicable to petitioner's refusal, in the cir-

<sup>4</sup>At the close of the hearing before the Judicial Inquiry petitioner reiterated his claims under the Fifth and Fourteenth Amendments and stated his reliance, in addition, upon the Fourth Amendment (R. 51).

circumstances of his claim, to answer questions or to produce records. Counsel for the Inquiry did contend at the hearing that petitioner's decision to continue to rely upon the privilege after having indicated that he would withdraw that privilege was a "lack of cooperation," but he did not contend that petitioner had made any irrevocable waiver of the privilege (R. 46). Counsel continued that the Inquiry would initiate disciplinary proceedings against petitioner, and that its position would be that petitioner's claim of privilege was a lack of cooperation in the same sense as that of the attorney in the *Cohen* case, justifying the same result—disbarment (R. 48).

After the close of the hearing, a petition for disciplinary proceedings against petitioner was filed by respondent, Solomon A. Klein,<sup>5</sup> by direction of the Judicial Inquiry. The petition (R. 4-10) alleged that this petitioner had been guilty of misconduct in ten separate respects. Eight of the charges were allegations that he had failed to comply with certain court rules relating to filing of retainer statements, that he had filed false pleadings, that he had commingled clients' funds with his own and that he had violated the canons of ethics. The ninth charge was that apart from his refusal to answer questions or to produce records, he had obstructed the Inquiry by obtaining repeated postponements and making or causing to be made false representations; and the tenth charge was that he was guilty of misconduct in that "his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of [petitioner] as a member of the legal profession . . . [R. 7]." The petition

<sup>5</sup> The order of the Appellate Division directing respondent to institute disciplinary proceedings against petitioner refers to respondent only as "an attorney" (R. 3-4), but respondent is Chief Counsel to the Judicial Inquiry.

and answer (see R. 57-58) were referred to a referee for hearing, at which hearing respondent announced that he was abandoning all charges in the petition other than the ninth and tenth charges (R. 13, 59). Petitioner was again called to testify, and he again refused to answer questions under a specific claim of all the federal constitutional provisions upon which he had relied in the Judicial Inquiry (R. 53-54).<sup>6</sup>

In his report, the referee found that respondent had not proven the allegations in the ninth charge. Among his findings were that there was no claim or evidence that petitioner's claim of privilege "was invoked more extensively than reasonably required to protect [him] against incrimination" (R. 67) and that the Inquiry was neither misled nor prejudiced by petitioner's July 1961 letter indicating his intention to withdraw his claim of privilege (R. 74-76). As to the tenth charge, the referee found that petitioner did refuse to answer questions and to produce records under claims of constitutional privileges, federal and state, but he made no finding as to whether the refusals were in violation of petitioner's duties as an attorney, since that question was "inextricably bound up with the constitutional issues raised by [his] affirmative defense, and resolution of those issues is not within my province [R. 79-80]."

Respondent moved in the Appellate Division for confirmation of the referee's report and for imposition of discipline against petitioner, and the Appellate Division entered an order disbaring petitioner (R. 81-83).<sup>7</sup> Finding

<sup>6</sup> While petitioner refused to answer questions in the hearing before the referee, the referee did not consider petitioner's conduct in that hearing as bearing upon respondent's charges of misconduct. Rather, he explicitly restricted his consideration to petitioner's conduct before the Judicial Inquiry (R. 61).

<sup>7</sup> In his brief in the Appellate Division in support of his motion to confirm the referee's findings, respondent for the first time suggested that petitioner did not have a constitutional right to refuse to produce his



the sole issue to be the charge that petitioner "had refused to produce his financial records and had refused to testify before the justice presiding at said Judicial Inquiry [R. 84]," the court, relying solely upon the *Cohen* case, held that an attorney has "an absolute right to invoke his constitutional privilege against self-incrimination" but that when he does so "he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar [R. 84-85]." The Court in no sense questioned either the applicability of the Fifth Amendment to petitioner's refusal to testify and to produce records or his good faith in asserting the privilege, but it held squarely that, if he elected to invoke the privilege, he could not continue to practice law (R. 85).

The Court of Appeals affirmed the judgment of the Appellate Division in a memorandum order without opinion, on the authority of *Cohen* "and on the further ground that the Fifth Amendment privilege does not apply to a demand" for the production of records "required by law to be kept" by an attorney (R. 86). Judge Fuld concurred, stating that, while he adhered to his views in dissent in *Cohen*, see 7 N.Y. 2d 488, 498-502, 166 N.E. 2d 672, 677-80, he deemed himself bound by that case.

Upon motion by petitioner, the court subsequently amended its remittitur, stating that petitioner's claims of violation of his federal privilege against self-incrimination

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records. Neither in the Judicial Inquiry nor in the hearing or briefs before the referee did respondent assert that the required records doctrine removed petitioner's privilege. (While they are not a part of the printed record, the parties' briefs before the referee and in the Appellate Division are included in the record certified to this Court.)



and of his right to due process of law were necessarily passed upon (R. 90-91).

### Summary of Argument

1. The principal reliance of the Court of Appeals and the sole reliance of the Appellate Division in support of their judgments was the decision in *Cohen v. Hurley*, 366 U.S. 117, affirming 7 N.Y. 2d 488, 166 N.E. 2d 672, which held that disbarment of an attorney who refused, under a claim of the State privilege against self-incrimination, to testify and to produce records before the Judicial Inquiry, did not violate the standard of fundamental fairness of the Fourteenth Amendment. We contend that reliance upon *Cohen* was misplaced, since the Court's decision in *Malloy v. Hogan*, 378 U.S. 1, expressly repudiated the rationale of *Cohen* and made clear that state action is limited by the same standard of the self-incrimination clause of the Fifth Amendment which restricts federal action. That standard precludes the imposition of a penalty which makes more costly the exercise of the privilege against self-incrimination, *Griffin v. California*, 380 U.S. 609, and disqualification from the practice of one's profession is just such a proscribed penalty. And if disbarment in these circumstances is not a *penalty* within the meaning of the Fifth Amendment, it is clearly a method of compulsion employed by the State to extract incriminating evidence, and any such compulsion is prohibited by the Fifth Amendment. *Bram v. United States*, 168 U.S. 532.

2. Even if the threat of disbarment is not the kind of compulsion that the federal and state governments may not employ by virtue of the specific prohibition of the Fifth Amendment's self-incrimination clause, this Court's decision in *Malloy* establishes that the requirements of fundamental fairness imposed by the due process clause of the

Fourteenth Amendment may no longer be determined without reference to the duty of a state to preserve the guarantees of the Fifth Amendment. Thus, *Cohen* and other of this Court's decisions must be re-examined in light of the individual's right, now protected against state action, to be free from compulsory self-incrimination. That vital interest, weighed against the absence of any showing by the State that its legitimate interest in maintaining the standards of the bar cannot be protected by shouldering its burden of independent investigation and proof of wrongdoing, compels the conclusion that the State's imposition upon attorneys of an election between relinquishment of the privilege against self-incrimination and disbarment is arbitrary and capricious. See *Slochower v. Board of Education*, 350 U.S. 551; *Wieman v. Updegraff*, 344 U.S. 183. Similarly, the State's recognition of the availability of the privilege to petitioner as a citizen but its unavailability to him as an attorney evidences a classification which is not only arbitrary within the meaning of the due process clause of the Fourteenth Amendment but also fatally discriminatory within the meaning of that Amendment's equal protection clause.

3. No different conclusion results from the fact that the State required attorneys to keep records pertaining to the disposition of actions in which they represented clients under contingent fee arrangements. Even if the "required records" doctrine established in *Shapiro v. United States*, 335 U.S. 1, were a valid limitation upon the scope of the privilege against self-incrimination and were applicable to the record requirement involved in this case, petitioner's disbarment, based only in part on that doctrine and in part on the invalid rationale of *Cohen*, could not stand. See *Thomas v. Collins*, 323 U.S. 516, 519. But in any event the *Shapiro* doctrine that the government, state or federal, may

remove the applicability of the privilege to the papers of an individual merely by enacting a requirement that such papers be kept is wholly invalid, as an unwarranted limitation upon the scope of the privilege as earlier determined in *Boyd v. United States*, 116 U.S. 616, as inconsistent with the recent decision in *Albertson v. SACB*, 382 U.S. 70, and as violative of this Court's repeated injunctions that the privilege be accorded a liberal construction. See e.g., *Miranda v. Arizona*, 384 U.S. 436, 461.

Even assuming that the scope of the privilege can be limited to an extent through state-imposed record-keeping requirements, the policy of the privilege requires at least that such limitations be no more extensive than clearly required in order to protect a valid state interest which cannot adequately be protected through any means other than a limitation upon the scope of the privilege. No such showing has been made in this case and, therefore, the required records doctrine is inapplicable. Further even if some limitation of the scope of the privilege were necessary to effect the State's interest here, the State has removed the privilege from a class of documents much broader than that involved in *Shapiro*, so that that case does not support the State's unduly broad intrusion into the privacy guaranteed by the Fifth Amendment privilege.

Finally, whatever may be the validity and scope of the required records doctrine, its application to this case, where the availability of the privilege was recognized by the Judicial Inquiry and the Appellate Division and was only belatedly questioned by respondent, is inconsistent with *Raley v. Ohio*, 360 U.S. 423.



## ARGUMENT

### **I. The Disbarment of Petitioner Was a Violation of the Specific Guaranties of the Fifth Amendment.**

#### **A. The Reliance of the Courts Below Upon *Cohen v. Hurley* was Misplaced.**

The opinion of the Appellate Division relied solely upon the decision in *Cohen v. Hurley*, and the Court of Appeals also relied upon that case. In *Cohen*, this Court upheld the disbarment of an attorney for his refusal to testify and to produce records before the same Judicial Inquiry involved in this case, holding that it was neither arbitrary nor discriminatory for the State to disbar an attorney who, by claiming his *State constitutional privilege* against self-incrimination, failed adequately to "cooperate" with the Inquiry. The Court passed only upon the contention that it was fundamentally unfair, and hence in violation of the Fourteenth Amendment, to force an attorney to elect between relinquishment of the privilege and disbarment. In rejecting that contention the Court relied upon the premise that "a State has great leeway in defining the reach of its own privilege against self-incrimination . . ." 366 U.S., at 125. The Court also held that the attorney had not preserved any Fifth Amendment claim and that, in any event, no Fifth Amendment privilege was applicable in a State proceeding. Thus, under the analysis of the majority in *Cohen*, "if any 'constitutional privilege against self-incrimination' has here been made a 'phrase without reality'" it can only have been a state privilege which this Court does not have jurisdiction to protect." *Id.*, at 128, n. 8. But see *id.*, at 131-166 (dissenting opinions of Black, Douglas and Brennan, J.J.).

We contend that the Court's due process analysis in *Cohen* should be re-examined and rejected, see pp. 29-39,



*infra*, but, in any event, that analysis is inapplicable to petitioner's claim under the Fifth Amendment. The *Cohen* premise that the Fifth Amendment prohibition against compulsory self-incrimination does not limit state action was rejected in *Malloy v. Hogan*, 378 U.S. 1, which held that "the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement. . . ." *Id.*, at 8. (Emphasis added.) *Malloy* explicitly rejected the suggestion that "the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding," holding that "[i]f *Cohen v. Hurley* . . . and *Adamson v. California* . . . suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded." *Id.*, at 10-11. Thus the Court is faced here not with a claim limited to a State privilege but with petitioner's claim, timely presented and preserved at all stages of this case, that the State's action in disbarring him for his refusal to relinquish his Fifth Amendment privilege is in violation of the guaranties of that privilege, as secured against state action by the Fourteenth Amendment.

**B. *The Standard of the Fifth Amendment Prohibits Imposing the Penalty of Disbarment as a Consequence of Invoking the Privilege Against Self-Incrimination.***

As a preliminary matter, we note that, throughout the proceedings in this case, the parties and the courts have focused not upon the question of whether the privilege was available to petitioner but rather upon the question of the sanction—i.e., disbarment—which might or might not constitutionally be imposed in consequence of petitioner's refusal to relinquish a valid claim of the privilege.

The Court of Appeals placed partial reliance upon the inapplicability of the privilege to so-called required records, an aspect of this case that we discuss at pp. 42-58, *infra*, but its primary reliance was upon *Cohen*, which upheld disbarment based upon a concededly valid claim of the State privilege. The Appellate Division, the referee, and the Presiding Justice all accepted that petitioner's claim of federal privilege was valid and in good faith both as to his refusal to testify and his refusal to produce records, and no challenge was made in the Judicial Inquiry to the method by which or the circumstances in which petitioner invoked the privilege. In his Brief in Opposition to the Petition for Certiorari, however, respondent contended for the first time that petitioner's refusal to answer questions was a defective "blanket refusal." Brief in Opposition, pp. 10-11. That challenge, even if it were valid, should have been made at the time that petitioner invoked the privilege before the Judicial Inquiry, and may not be relied upon at this late stage. See *Stevens v. Marks*, 383 U.S. 234; *Raley v. Ohio*, 360 U.S. 423; *Quinn v. United States*, 349 U.S. 155.

Thus, the question appropriately before the Court is whether the State could disbar petitioner for his refusal to relinquish a valid claim of the privilege against self-incrimination. The federal standard, which the courts below failed to apply, is clear from *Malloy*—the State may not infringe "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U.S., at 8. (Emphasis added.) More recently the Court reaffirmed that standard in *Griffin v. California*, 380 U.S. 609, 614, holding that comment by a prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by

making its assertion costly."<sup>6</sup> That broad protection of the privilege has been recognized at least since *Boyd v. United States*, 116 U.S. 616, 634-5, and has been reaffirmed repeatedly by this Court. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 461; *Hoffman v. United States*, 341 U.S. 479; *Counselman v. Hitchcock*, 142 U.S. 547.

The bar against governmental action imposed by the Fifth Amendment has consisted of two facets: it has prevented the use of compulsion to elicit incriminating statements or documents in any proceeding, civil or criminal, and in any forum, judicial, investigative or administrative, see e.g., *Boyd v. United States*, *supra*; *Counselman v. Hitchcock*, *supra*; *McCarthy v. Arndstein*, 262 U.S. 355, 266 U.S. 34; *Smith v. United States*, 337 U.S. 137; *Quinn v. United States*, 349 U.S. 155; and it has also prevented the use as evidence in a criminal proceeding of statements by or documents of the accused obtained through compulsion or stealth, see e.g., *Gouled v. United States*, 255 U.S. 298; *Wan v. United States*, 266 U.S. 1; cf. *Haynes v. Washington*, 373 U.S. 503. Only to a limited extent, however, have the opinions of this Court focused upon the type of compulsion, if any, that may be employed to "persuade" a person to relinquish his privilege.

It should be emphasized that the question presented here is not whether petitioner had a privilege to refuse to disclose information which could not lead to "incrimination" but which could lead to disbarment, cf. *Ullmann v. United States*, 350 U.S. 422, but rather whether the State could use the threat of disbarment to compel petitioner to dis-

<sup>6</sup> We note incidentally that this case presents no question of retroactivity. Compare *Tehan v. Shott*, 382 U.S. 406. Respondent moved in the Appellate Division for confirmation of the referee's report and imposition of discipline against petitioner on April 20, 1965 (R. 82), almost one year after the decision in *Malloy* and the day after the decision in *Griffin*. Both the referee's report (R. 75) and the decision of the Appellate Division (R. 85) noted petitioner's reliance upon *Malloy*.



close information which might tend to incriminate him, and, failing in its purpose, use the sanction of disbarment as a penalty for petitioner's refusal to relinquish the privilege. We do contend that, under this Court's decisions, disbarment is a penalty indistinguishable from the penalty imposed upon conviction of crime, so that the State could not compel petitioner to disclose information which might lead to disbarment, and *a fortiori* it cannot disbar him for refusal to disclose the information, since its action would amount to adjudication of criminal guilt from invocation of the privilege. But if disbarment is not incrimination, so that one may not refuse to disclose information which might lead only to disbarment, it does not follow that the State may impose it as a sanction for refusal to disclose information which is protected by the privilege. The question then is whether imposition or threat of disbarment is *compulsion* which may not be used by the State as a means for inhibiting exercise of the privilege.

The *Malloy* and *Griffin* cases, as pointed out above, indicate that the Fifth Amendment should be construed liberally and that no form of governmental coercion, direct or indirect, that serves to impair the exercise of the privilege may stand against the bar of the Fifth Amendment. Statements in this Court's opinions may be found, however, suggesting that only certain types of compulsion are forbidden. In *United States v. White*, 322 U.S. 694, 698, for example, it was said that the privilege was "designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . .". Moreover, the immunity cases, from *Brown v.*

\* Mr. Justice Stewart, dissenting in *Griffin v. California*, 380 U.S. 609, 620, stated that historically the privilege came into being because a person could decline to answer an incriminating question only "on pain of incarceration, banishment, or mutilation." But compare the very different view taken in *Brown v. United States*, 106 U.S. 552, 547-48 quoted *infra*, pp 24-



*Walker*, 161 U.S. 591, to *Ullmann v. United States*, *supra*, may be read as forbidding the Government only from imposing something akin to criminal punishment—e.g., fine or imprisonment for contempt—as a means for compelling testimony or the production of records, although that conclusion by no means necessarily follows from those cases. While they held that a witness may be required to testify if he is accorded immunity from criminal prosecution that is as extensive as the protection of the privilege that is being replaced, they did not hold and it has never been held that the Government is free to *deny* immunity and also to impose a variety of non-criminal or quasi-criminal disabilities upon a person who exercises the privilege.

Even if the Fifth Amendment were to be given a narrow, restrictive reading, and held to forbid the imposition only of sanctions penal in nature upon a person who asserts the privilege, the decisions of this Court establish that forfeiture of an attorney's right to earn a livelihood in his profession must be regarded as such a prohibited sanction. While most of these decisions involve the prohibitions of Article I, Sections 9 and 10, against bills of attainder, the sanction prohibited by those provisions is the legislative infliction of *punishment* without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315. If the Fifth Amendment is to be interpreted to forbid only punishment criminal in nature as the means of extracting incriminating evidence there is no apparent reason why the definition of punishment under the Fifth Amendment

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25. Whatever may have been the forms of compulsion against which the privilege originally was directed, however, this Court has shown that the constitutional protection of the individual's free will is perfectly capable of expanding to meet advancements in governmental techniques which replace raw force with subtle psychological pressures as the means of compulsion. Compare, e.g., the coercive techniques in *Brown v. Mississippi*, 297 U.S. 278; *Chambers v. Florida*, 309 U.S. 227; *Haynes v. Washington*, 373 U.S. 503; and *Miranda v. Arizona*, 384 U.S. 436.

should not be at least as broad as the definition of punishment for purposes of Article I, Sections 9 and 10.

In *Ex Parte Garland*, 4 Wall. 333, 377, this Court held invalid as a bill of attainder a statute which denied an attorney the right to practice, stating that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."<sup>10</sup> In *Cummings v. Missouri*, 4 Wall. 277, provisions of the Missouri Constitution were held invalid as a bill of attainder and *ex post facto* law because "they produce the same result [as criminal statutes] . . . by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment. . . ." *Id.*, at 327.

The earlier bill of attainder cases involved legislative declarations of criminal guilt accompanied by provision for punishment, see *United States v. Lovett*, 328 U.S. 303, 321-322 (concurring opinion of Frankfurter, J.), but the Court in the *Lovett* case held that the formality of such a pronouncement of criminal guilt was not an essential element of unconstitutionality. There the Court held unconstitutional a federal statute which prohibited the further compensation of named government employees. Holding that the "permanent proscription from any opportunity to serve the Government is punishment, and

<sup>10</sup> In *Ex Parte Wall*, 107 U.S. 265, the Court upheld the disbarment of an attorney from a federal court upon proof of his participation in a lynching, holding that the proceeding was not in violation of the due process clause of the Fifth Amendment. The Court there recognized, however, that "an attorney's calling or profession is his property, within the meaning of the Constitution," *id.*, at 289, and Mr. Justice Field in dissent stated that, "to disbar an attorney is to inflict upon him punishment of the severest character." *Id.*, at 318.

In holding that the proceedings deprived the attorney of no substantial rights, the Court noted that he "was not required to criminate himself by answering under oath." *Id.*, at 271.

of a most severe type," *id.*, at 316, the Court continued that "[t]he fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Ibid.* Under the same reasoning, the disbarment of petitioner in this case is no less effective a punishment than if the courts below had held him in contempt for refusing to relinquish the privilege, which they clearly could not do, see *Quinn v. United States*, 349 U.S. 155, and then disbarred him as punishment for that contempt.<sup>11</sup>

It is, of course, not controlling whether the State labels either the sanction or the proceeding in which it is imposed "criminal" or "civil." In *Boyd v. United States*, 116 U.S. 616, the Court held unconstitutional a federal statute providing for compulsory production of documents which by its terms applied to "suits and proceedings other than criminal," 18 Stat. 187, quoted at p. 51, n. 22, *infra*, and the proceeding in *Boyd* was a civil forfeiture action against property, to which Boyd was a party only because he entered a claim for the property. The statute struck down in *Boyd* offered an election between production of the document and forfeiture of the 35 cases of plate glass at issue in the proceeding. The Court held that "[a] witness, as well as a party, is protected by the law from being compelled to give evidence that tends to

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<sup>11</sup> Disbarment as punishment for contempt has been applied in the state courts. See 17 C. J. S. Contempt, § 92; *In re Dunn*, 85 Neb. 698, 124 N.W. 120; *In re Hanson*, 134 Kan. 145, 5 P. 2d 1088. As for federal courts, in *Ex Parte Robinson*, 19 Wall. 505, this Court issued a mandamus ordering vacation of an order disbarring an attorney as punishment for contempt, holding that the specific kinds of punishment for contempt enumerated in the Judiciary Act of 1789 negated all other types of punishment, including disbarment. But cf. *Gelders v. Haygood*, 182 Fed. 109 (Cet. Ct. S.D. Ga.).



briminate him, or to subject his property to forfeiture." *Id.*, at 638. Thus the Court found the sanction to be within the "spirit" though not the "literal terms" of both the Fourth and Fifth Amendments, *id.*, at 633, since "proceedings instituted for the purpose of declaring forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Id.*, at 634. Compare *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701, where the Court applied the Fourth Amendment's exclusionary rule to a proceeding for forfeiture of an automobile, noting that the forfeiture of a \$1,000 automobile was an "even greater punishment" than the maximum penalty of a \$500 fine that could have been imposed upon the owner in a criminal proceeding.

Finally, the punitive character of petitioner's disbarment would not be altered by any argument of the State that its purpose was not vindictive but only preventive—i.e., to safeguard the bar and the public from whatever harm might be caused in the future by an attorney so lacking in candor and frankness that he claimed the privilege against self-incrimination. The Court only recently rejected just such an argument in *United States v. Brown*, 381 U.S. 437. In holding unconstitutional as a bill of attainder a federal statute which disqualified members of the Communist Party from holding union offices, the court in *Brown* said that "[i]t would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Id.*, at 458.

Disbarment, then, clearly can be regarded as punishment criminal in nature, just as can other sanctions apart from fine or imprisonment. In *Speiser v. Randall*, 357



U.S. 513, 518, for example, the Court held that "[t]o deny an exemption [from property taxes] to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." See, also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-184; *Steinberg v. United States*, 143 Ct. Cl. 1, 163 F. Supp. 590; see generally, Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472 (1957). Since the State could not constitutionally require petitioner to disclose information which could result in the imposition of the penalty of disbarment, it could not constitutionally impose that penalty upon him solely because he refused to relinquish his privilege.

That a broad meaning must be given to the term, "criminal," as it is used in the Fifth Amendment was established in the opinion of Mr. Justice Bradley for the Court in *Boyd*. That opinion should be considered in light of his earlier opinion as Circuit Justice in *Rich v. Campbell*, reported *sub nom. United States v. Collins*, 25 Fed. Cas. 545, 549-550 (Cct. Ct., S.D. Ga.), in which a United States Marshal was called as a witness in connection with a party's challenge that jurors were improperly selected by the court's officers, of whom the Marshal was one. The court

"refused to compel him to testify, for the following reasons: Where a charge of misconduct is made against an officer, *whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment*, he is not bound to be a witness against himself. To compel him to be so would infringe the spirit, if not the letter, of the fifth amendment to the constitution of the United States, which expressly declares that no person shall be compelled, in any criminal

case, to be a witness against himself. An inquisitorial examination, under oath, of a party charged with an offense, is repugnant to the principles of personal liberty, which are embodied in every fibre of the common law. . . . If the party stands upon his rights, it raises an implication, however unjustifiable, that there is some good reason (unfavorable to him) for his refusal to be examined. *Such an implication ought in no case to exist.* The immunity is founded on principles of public policy and a regard to the just liberties of every citizen; and, when claimed, ought to be regarded and claimed as a fundamental right which cannot be properly assailed." (*Emphasis added.*)

That is the view of the fundamental character of the privilege against self-incrimination which found its way into *Boyd*, and that is the view of the privilege which we contend should apply in according the privilege "liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486.

It is, however, unnecessary to reach the question of whether disbarment is equivalent to incrimination within the meaning of the Fifth Amendment. This Court's decisions demonstrate that the threat of fine or imprisonment or its equivalent is not the only form of compulsion which the government may not employ to elicit information protected by the privilege. Only last term, in *Miranda v. Arizona*, 384 U.S. 436, this Court reaffirmed the teaching of *Bram v. United States*, 168 U.S. 532, that it is the extraction of incriminating evidence by the exercise of any improper influence that is forbidden by the Fifth Amendment. The *Bram* opinion explained that since the common law principle holding "that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of

compulsion, whether arising from torture or moral causes, the rule formulating the principle with logical accuracy, came to be so stated as to embrace all cases of compulsion which were covered by the doctrine." And it was this doctrine which, while "in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Id.*, at 547-48, 545.

While *Bram* and *Miranda* involve the second facet of the Fifth Amendment's prohibitions, in that the sanction there imposed was the suppression of evidence obtained by unlawful compulsion, those cases held that the means employed to obtain such evidence were in violation of the Fifth Amendment. Since persistent questioning of an accused, in the absence of counsel and without adequate warning of his right to remain silent, can hardly be characterized as criminal punishment, it is evident that at least some forms of compulsion other than criminal punishment are denied the government. Similarly, comment by a prosecutor in a criminal proceeding upon the refusal of an accused to testify is not in itself criminal punishment but it is nonetheless prohibited by the Fifth Amendment. *Griffin v. California*, 380 U.S. 609.

If the Court should accept our contention that the forms of compulsion forbidden by the Fifth Amendment are not limited to penal sanctions but should draw the line somewhere between the prohibition of any compulsion and the prohibition of only the most severe kinds of compulsion, there can be little question as to the side of that line on which this case would fall. The badge of infamy that a decree of disbarment inflicts upon an attorney is as drastic a penalty as imprisonment. Indeed, the disgrace imposed upon an attorney and his family, coupled with the deprivation of his livelihood, make almost insignificant the forfeiture of 35 cases of plate glass held to be an unlawful penalty in *Boyd*. Thus, even if it should some day be held



that a person may be required to elect between relinquishment of the privilege and some comparatively mild form of governmental compulsion, the governmental imposition of a choice between disbarment and relinquishment of the privilege cannot be countenanced.

*C. Petitioner's Disbarment was Imposed as a Consequence of Invoking the Privilege.*

The Appellate Division, apparently in an attempt to avoid the decision in *Slochower v. Board of Education*, 350 U.S. 551, that a statute which "operates to discharge every city employee who invokes the Fifth Amendment" is unconstitutional, 350 U.S., at 558, reiterated the language from its opinion in *Cohen* that the basis for disbarment was not petitioner's invocation of the privilege but rather his deliberate refusal "to cooperate with the court . . . [R. 85]." The opinion continued, however, as follows:

"Under the circumstances, this court has no alternative other than to disbar the [petitioner]. If he elects to invoke his constitutional privilege against self-incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar. To that doctrine this court must adhere [R. 85]."

Thus, the court destroyed its own attempt to rationalize that its action was not a penalty imposed as a consequence of exercising the privilege by stating clearly that it was precisely such a penalty. The doctrine to which it "must adhere" is inflexibly to put attorneys to "a choice between the rock and the whirlpool," *Stevens v. Marks*, 383 U.S. 234, 243, disbarring all who invoke the privilege when called upon to testify and produce their records. Here, as in *Slochower*, "the assertion of the privilege against



self-incrimination is equivalent to "a resignation" and "[t]he heavy hand . . . falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." 350 U.S., at 554, 558.

Both the opinion of the Appellate Division and the referee's report establish that the charge of petitioner's purported failure to cooperate with the Judicial Inquiry was sustained only as to his refusal to testify and to produce records, and they also establish that the refusal was based upon a good faith claim of his privilege against self-incrimination. Indeed, the referee soundly refrained from making a finding as to whether petitioner's refusal was a violation of his duties as an attorney on the ground that the question was "inextricably bound up with the constitutional issues raised" by him (R.80). The State cannot extricate the inextricable by ignoring the only basis for petitioner's refusal to furnish information, looking only at the refusal, itself, and labeling it a violation of a duty to cooperate or to be candid and frank.<sup>12</sup> Whatever it may call its action, the "legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings v. Missouri*, 4 Wall. 277, 325.

Unquestionably, petitioner has a duty as an attorney to be candid and to cooperate with the Court, but he also has a constitutional right to refuse to furnish information

<sup>12</sup> We recognize that this Court has, at times, been willing to accept a State's characterization of its action at face value in cases similar to this one though not presenting the question of the application to the State of the specific guaranties of the Fifth Amendment. We discuss those cases at p. 32, n. 14, *infra*. Nonetheless, there is a "long course of judicial construction which establishes that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121; see *Napue v. Illinois*, 360 U.S. 264, 271-2; *Haynes v. Washington*, 373 U.S. 503, 516-518.

which might tend to incriminate him. Indeed, prior to *Cohen* the State had repeatedly recognized that "[t]he constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court." " *In re Grae*, 282 N.Y. 428, 435, 26 N.E. 2d 963, 967; see *In re Solovei*, 276 N.Y. 647, 12 N.E. 2d 802. But the State in *Cohen*, 7 N.Y. 2d 488, 166 N.E. 2d 672, *aff'd*, 366 U.S. 117, created a new kind of duty, in a test case prepared by the Judicial Inquiry, in the words of its Presiding Justice, because "[i]t was the thought in some quarters that such an attitude, or such a plea [of the privilege], made in the context of this Inquiry, might be indicative of such a lack of candor . . . as to warrant disciplinary proceedings based upon that ground alone [R.30]." We contend that the purpose of that test case was to provide a basis for restricting the exercise by attorneys of the privilege against self-incrimination, as evidenced by the above statement and by the statement of an earlier Presiding Justice of the Inquiry, quoted in *Anonymous v. Baker*, 360 U.S. 287, 296, n. 11:

"We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.

"As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and

10 doctors. Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts." (Emphasis

added.)

The "roadblock" then was the State privilege, but it now includes the Fifth Amendment privilege as well. It is a roadblock aptly characterized as "one of the great landmarks in man's struggle to make himself civilized," *Griswold, The Fifth Amendment Today* 7 (1955), and it cannot be surmounted or skirted by the State or by the federal government through penalizing those, such as petitioner, who choose to invoke it.

## II. The Disbarment of Petitioner Was Arbitrary and Discriminatory State Action in Violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

As we have just shown, petitioner's disbarment was a penalty prohibited by the self-incrimination clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. We show below that the State's action was also in violation of the more generalized prohibitions of the Fourteenth Amendment's due process and equal protection clauses, which prohibit arbitrary or discriminatory deprivation of either one's right to practice a profession or of public employment. *Konigsberg v. State Bar*, 353 U.S. 252; *Schwartz v. Board of Law Examiners*, 353 U.S. 232; *Slochower v. Board of Education*, *supra*; *Wieman v. Updegraff*, 344 U.S. 183.

### A. The Standard of Fundamental Fairness in This Area Is Not Controlled by Cases Decided Prior to the Application of the Privilege Against Self-Incrimination As a Limitation Upon State Action.

To say that we contend, in this portion of our argument, that the State has failed to comply with the standard of fundamental fairness imposed by the Fourteenth Amendment is by no means to say that the full application



to the states of the Fifth Amendment privilege against self-incrimination is not relevant to that standard. Even if disbarment of an attorney is not a penalty absolutely proscribed by the Fifth Amendment, there can be no question about the very substantial deterrent effect of disbarment upon the exercise of a privilege which the states are now required fully to protect. Accordingly the determination of whether the automatic disbarment of a lawyer who invokes the privilege against self-incrimination amounts to a denial of due process cannot be made without according full weight to the privilege and its policies, which include preservation of "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load. . . ." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55. In short, if the disbarment is within the specific prohibitions of the Fifth Amendment, the State may not impose that penalty whatever may be the legitimacy or weight of its countervailing interest. *Miranda v. Arizona*, 384 U.S. 436, 479; see *Barenblatt v. United States*, 360 U.S. 109, 126. But if the compulsory effect of disbarment as an unquestionable deterrent to the exercise of the privilege somehow falls short of the kind or degree of compulsion absolutely prohibited by the standard of the Fifth Amendment, the question becomes whether the State's interest in maintaining the standards of its bar is so compelling and the means used to effect that interest—the adoption of a rule that denies every attorney who refuses to relinquish the privilege the right to earn a living in his chosen profession—are so essential that the constitutional rights of the individual must be relinquished to enable that interest to be achieved.

In considering this question, the decision in *Cohen v. Hurley*, 366 U.S. 177, is plainly not controlling. Whatever



may have been the validity of the analysis and the determination reached in the *Cohen* case at the time it was decided, the subsequent recognition by this Court that the privilege against self-incrimination is a fundamental personal liberty that serves to limit state action by reason of the due process clause of the Fourteenth Amendment eliminates any value as a precedent that that case might otherwise have had. A major premise of *Cohen*, in concluding that disbarment there was *not* irrational and arbitrary, was that the State was not limited by the attorney's federal constitutional right not to incriminate himself, so that, "something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony." 366 U.S., at 129.

Admittedly, the decisions cited by the Court for the absence of any protection against self-incrimination in a state proceeding furnished strong support for the conclusion that disbarment for a refusal to relinquish the privilege was not arbitrary. Thus, the Court cited, *id.*, at 128-129, *Twining v. New Jersey*, 211 U.S. 78, and *Adamson v. California*, 332 U.S. 46, which established that there was no denial of fundamental fairness in requiring a criminal defendant to elect between testifying or suffering the penalty of comment by the prosecutor upon his refusal to do so; and *Knapp v. Schweitzer*, 357 U.S. 371, which held that a state grand jury witness could constitutionally be held in contempt for his refusal to subject himself to federal incrimination. If a state may jail a person for refusing to testify on the ground of possible federal incrimination, it is not inconsistent to permit disbarment for a similar refusal. But the major premise of *Cohen* was repudiated by this Court's decision in *Malloy*, and the applications of that premise in *Twining*, *Adamson* and *Knapp* were also repudiated in *Griffin v. California*, 380

U.S. 609, and *Murphy v. Waterfront Comm'n*, 378 U.S. 52.<sup>13</sup>

In light of the course of constitutional interpretation by this Court since *Cohen*, then, the standards applied in that case are inapplicable to the question of the validity of state procedures which operate to impair the personal liberties guaranteed by the privilege against self-incrimination.<sup>14</sup>

<sup>13</sup> As pointed out at p. 14, *supra*, this Court in *Cohen* also held that the petitioner had preserved only his State constitutional privilege and not his Fifth Amendment privilege. Thus the question was whether the State's admitted interest in maintaining the standards of the bar was of sufficient importance to permit it, without violating the due process clause of the Fourteenth Amendment, to require relinquishment of the State privilege as a means of accomplishing that objective. The scope of that privilege, in the absence of a federal constitutional requirement that such a privilege must be accorded by the State, was obviously a matter for determination by the State and not by this Court. A very different question is presented here.

<sup>14</sup> The same conclusion follows as to this Court's related decisions in *Nelson v. Los Angeles County*, 362 U.S. 1; *Beilan v. Board of Education*, 357 U.S. 399; and *Lerner v. Casey*, 357 U.S. 468, in which dismissals from public employment of persons who refused to answer questions in varying circumstances were upheld. In *Beilan* the employee did not base his refusal upon any form of privilege against self-incrimination, although subsequent to his refusal to answer questions posed by his State employer and previous to his dismissal for "incompetency," he did refuse to testify before a subcommittee of the House Un-American Activities Committee on Fifth Amendment grounds.

Both *Nelson* and *Lerner* did involve dismissals of employees who had invoked the privilege as a ground for refusal. In *Lerner*, the Court reasoned that the State could dismiss an employee under statutory grounds of "doubtful trust and reliability," 357 U.S., at 470, because of his refusal to answer a relevant question. It then found that,

"The issue then reduces to the narrow question whether the conclusion which could otherwise be reached from appellant's refusal to answer is constitutionally barred because his refusal was accompanied by the assertion of a Fifth Amendment privilege. We think it does not. The federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment in this state investigation." *Id.*, at 478. (Emphasis added.)

The Court in *Nelson* regarded that case as controlled by *Beilan* and *Lerner*. See 362 U.S., at 7.

Thus, while we would contend that *Nelson*, *Beilan* and *Lerner* were, even when decided, unwarranted limitations upon the principle of *Slochower v. Board of Education*, 350 U.S. 551, in any event they are no longer controlling in light of *Malloy*, *Griffin*, *Murphy*, and *Miranda*.

**B. The Disbarment of Petitioner Under the Circumstances of This Case Was Arbitrary.**

Petitioner in no sense disputes the legitimacy of the State's interest in maintaining high standards of competence and character among the members of the bar; nor does he dispute, as Judge (later Mr. Justice) Cardozo stated in *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 471, 162 N.E. 487, 489, that an attorney becomes "an instrument or agency to advance the ends of justice."<sup>15</sup> Neither does he dispute that an attorney may be disciplined or disbarred if he is proven, in a proceeding consistent with the standards of the Fourteenth Amendment, not to have maintained the standards which the State imposes upon its attorneys. But this Court has long recognized that, however valid may be a state's interest in regulating the practice of law, the means used to effect that interest will be subjected to the strictest scrutiny when they operate to curtail federal constitutional rights. See *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1; *NAACP v. Button*,

<sup>15</sup> At the same time, we note that the *Culkin* case, from which the Court quoted in *Cohen*, see 386 U.S., at 124, 126-127, involved quite a different situation from that involved here. In *Culkin*, an attorney was imprisoned for contempt for refusal to testify or even to be sworn in a Judicial Inquiry, and the New York Court of Appeals upheld the contempt judgment. No claim of privilege against self-incrimination was involved, and Judge Cardozo posed the issue thus: "We are now asked to hold that, when evil practices are rife to the dishonor of the profession, [an attorney] may not be compelled . . . to say what he knows of them, subject to his claim of privilege if the answer will expose him to punishment for crimes." 248 N.Y., at 471, 162 N.E., at 489. (Emphasis added.)

We have already referred, at p. 28, *supra*, to the consistent position of the New York Court of Appeals prior to *Cohen* that an attorney's claim of the privilege against self-incrimination could not be a breach of any duty to the court, and that position has also been taken by the courts of other states. See, e.g., *In re the Integration Rule of the Florida Bar*, 103 So. 2d 873; *In re Holland*, 377 Ill. 345, 36 N.E. 2d 543; but see *Drophy v. Industrial Acc. Commission*, 46 Cal. App. 2d 278, 115 P. 2d 826; *In re Fenn*, 235 Mo. App. 24, 128 S.W. 2d 657; see generally, Note, *The Privilege to Practice Law versus the Fifth Amendment Privilege to Remain Silent*, 56 N.W.U.L. Rev. 644 (1961).



371 U.S. 415; *Schwartz v. Board of Law Examiners*, 353 U.S. 232. As in other areas "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524, and the means "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488.

It is, first of all, clear that the objective of a bar that adheres to the highest standards of ethical behavior, while important, is not of pre-eminent importance. It is not of the same order, for example, as the nation's need to preserve itself against foreign invasion, or internal subversion, or economic collapse. Indeed, the State's interest in a bar of high character is, we submit, of no greater importance than its interest in convicting those guilty of major crimes—an interest that by the explicit command of the Constitution is made subordinate to the Fifth Amendment. And it is not without significance that our system of law enforcement, while no more perfect than any other human institution, has operated quite satisfactorily in the almost two centuries since the Fifth Amendment was adopted.

As to the means here used by the State, what has been done, as the opinion of the Appellate Division makes clear, is to call attorneys before a secret investigation in which no charges are made against them and to require them to answer questions and produce all their financial records for examination. If such attorneys refuse to "cooperate" with these procedures under good faith claims of their privilege against self-incrimination, the State has an inflexible rule that they must be disbarred. The State's rationale for that inflexible rule is difficult to grasp. The Appellate Division's opinion appears to deny that any inference of guilt is drawn from the invocation of the privi-



lege, but at the same time it equates invocation of the privilege with a lack of candor and frankness. In the *Slochower* case, of course, the New York Court of Appeals even more clearly denied that any inference of guilt was drawn from Professor Slochower's invocation of the privilege, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377, but this Court nonetheless held that such an inference was made "[i]n practical effect," 350 U.S., at 558, and it condemned unequivocally "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Id.*, at 557; see *Grunewald v. United States*, 353 U.S. 391, 421. But that is exactly what was done by the State in this case. It gave a sinister meaning to petitioner's invocation of the privilege by finding therein a lack of candor and frankness which was found to be inconsistent with the duty of cooperation owed to the court.

If one accepts at face value the rationale of the Appellate Division, which was implicitly accepted by the Court of Appeals through its reliance upon *Cohen*, the State has created an absolute duty of attorneys to disclose information to the court, and it will not look behind the refusal to examine the reason. Thus, the duty is violated equally by one who refuses to cooperate merely on grounds of contumacy, by one whose refusal is based upon a good faith claim of the privilege against self-incrimination, and, possibly even by one who resists disclosure because it would involve privileged information obtained from a client. It is difficult to conceive of a more arbitrary procedure than to give undifferentiated treatment to these grounds for refusal to disclose information. Compare *Wieman v. Updegraff*, 344 U.S. 183. But if one looks behind the court's rationale, as we contend this Court can appropriately do, see pp. 27-28, *supra*, it appears that this absolute duty is newly created for the purpose of penalizing attorneys who, by exercising the privilege against self-incrimination,

put the Judicial Inquiry's staff to the task of developing independent evidence.

It cannot be denied, of course, that it is more efficient and simpler for the Judicial Inquiry to pursue its task through direct questioning of members of the bar, including both those who are suspected of unethical behavior and those who are not, than it is to develop independent evidence through less direct means. But the choice between greater efficiency of the State and the freedom of the individual was made long ago when the Bill of Rights was adopted. Where the protections of the Bill of Rights conflict with the efficacy of a system of law enforcement, it is the Constitution that must be respected and the system that must be modified to make it conform. *Escobedo v. Illinois*, 378 U.S. 478, 490; *Brown v. Mississippi*, 297 U.S. 278; see also *Entick v. Carrington*, 19 How. St. Tr. 1029, 1073-1074 (Ct. of Common Pleas).

The issue, however, is not whether it is simple or convenient for the State to insist upon relinquishment of the privilege but rather whether the State can manage to do without so drastic an invasion of a constitutional right and yet preserve the integrity of the bar. For where fundamental personal liberties are to be impaired the law or regulation must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy," *McLaughlin v. Florida*, 379 U.S. 184, 196 (Emphasis added.), and "a governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307.

New York's own history, to which we refer at p. 28, *supra*, does not indicate that recognition and preservation of the privilege has resulted in any noticeable lowering of

the standards of the bar or in the extent to which those standards are generally observed.<sup>16</sup> Nor is there anything in the record to support the bald conclusion of the Appellate Division that the kind of "cooperation" demanded by that court of members of the bar is a necessary condition to the maintenance of the desired standards of conduct.

On the contrary, this record discloses that the State's investigation would have been hampered very little had it adhered to its earlier practice of recognizing that exercise of the privilege against incrimination is wholly consistent with an attorney's obligations to the court. Petitioner complied fully with the special rules of the Appellate Division requiring the filing of statements of retainer. Accordingly, the pleadings filed by him in actions before the courts and the statements of retainer filed by him gave detailed information as to his activities as an attorney, see p. 4, n. 2, *supra*, so that the State had but to take the time required for independent investigation in order to establish whether he had abused his right to practice. Beyond the facts of this case, it seems to us highly unlikely that there will be many instances in which exposure of unethical practices by an attorney will turn solely upon the ability of the State to compel his testimony, in the face of a claim that it would be incriminating. In short, "[N]o conflict exists between constitutional requisites and exaction of the highest moral standards from those who would practice law." *Willner v. Committee on Character*, 373 U.S. 96, 106 (concurring opinion of Goldberg, J.).

It is possible that instances will arise in which invocation of the privilege may make it more difficult for an ap-

<sup>16</sup> The English practice appears historically to have accorded an attorney the right to refuse to give testimony in a disciplinary proceeding where the complaint against him involved an indictable offense, although he could be disbarred or cleared through independent evidence. See *Stephens v. Hill*, 10 Me. & W. 28, discussed in *Ex Parte Wall*, 107 U.S. 265, 277.



plicant for a license or a governmental benefit to establish that he possesses the requisite qualifications. See *Konigsberg v. State Bar*, 366 U.S. 36; cf. *Kimm v. Rosenberg*, 363 U.S. 405. He must still be allowed the opportunity to establish those qualifications, however, because a refusal to supply information upon a claim of federal constitutional right cannot of itself constitute evidence of bad character. *Konigsberg v. State Bar*, 353 U.S. 252.<sup>17</sup> There may be reason, moreover, for permitting a state greater leeway when it is dealing with applicants for a license than when it seeks to withdraw a license long enjoyed and relied upon. It is one thing to say, for example, that a state need not, in processing the hundreds of annual applications for admission to its bar, maintain a staff of investigators to establish by independent evidence the lack of qualifications of applicants who withhold information upon constitutional grounds. It is quite another thing to say that one who has long since established his qualifications and practiced under a license from the state may be called upon to appear before a secret investigation and given the burden of disproving, in absence of any charges of wrongdoing, that he has not maintained the standards required of him. Cf. *Speiser v. Randall*, 357 U.S. 513. And it is still another thing to say that that burden is not mitigated in any sense by a good faith claim that disclosure

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<sup>17</sup> Of course, if denial of admission to practice law is a penalty within the standard of the Fifth Amendment, there is no room for examination of any countervailing interest of the State. We recognize, however, that, even if disbarment of one who has been admitted to practice is a proscribed penalty, arguably the refusal to admit one to practice is a lesser kind of compulsion. In any event, the *Konigsberg* cases presented a different issue from that presented here, since the refusals there were based upon First rather than Fifth Amendment grounds, and a majority of this Court has taken the position that "the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances." *Barenblatt v. United States*, 360 U.S. 109, 126. (Emphasis added.)



might tend to subject him to incrimination. Indeed, it is in just this sort of proceeding that the Court has recognized the privilege to have its paramount justification, see *Grunewald v. United States*, 353 U.S. 391, 422-423, and it follows that it is in just this sort of proceeding where procedures inhibiting the exercise of the privilege are most arbitrary.

Americans today, with relatively inconsiderable exceptions, live upon what they earn and not what they own. To disbar a man who has practiced law for forty years, without complaint or reproach, when he has violated no valid law or regulation is, in the words of Mr. Justice Black in dissent in *Nelson v. Los Angeles County*, 362 U.S. 1, 10, a denial of due process "in its authentic, historical sense." The exercise of a constitutional right cannot be made the sole basis for denying a man the right to engage in the only profession for which he is qualified.

*C. Disqualification of Attorneys From the Exercise of a Privilege Guaranteed Other Citizens Is Invidious Discrimination.*

Even aside from the arbitrariness of the State's procedure on the grounds discussed above, the opinion of the Appellate Division attempts to create a classification under which petitioner as a citizen is entitled to exercise his privilege though he cannot do so as an attorney. That classification, of course, echoes the rationale of the New York courts and of this Court in the *Cohen* case. We contend, with all respect, that there can be no more invidious discrimination under the equal protection clause of the Fourteenth Amendment than to hold that an attorney, whose office is undertaken under an oath to support and defend the rights guaranteed by the Constitution and whose practice frequently may require him, in good faith, to

counsel clients to withhold information from the courts under that Constitution, is disqualified from exercising those rights for himself *because he is an attorney*. Compare *Takahashi v. Fish Comm'n*, 334 U.S. 410; *Truax v. Raich*, 239 U.S. 33. It is no answer to say that an attorney may be denied rights guaranteed to other citizens merely because his position is one of trust or because his status carries with it a duty of cooperation with the courts, since "a State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P. v. Button*, 371 U.S. 415, 429. Stripped of its trappings, the rationale for such a classification as between attorneys and other citizens is that, while the government may well tolerate a marginal standard of behavior from citizens in general, the much higher standards required of attorneys do not permit them to hide behind a constitutional privilege the function of which is to shelter those who have done wrong. But, as we have already shown, at p. 35, *supra*, this Court time and again has emphasized that no such view of the privilege against self-incrimination may be taken by the government, since "one of the basic functions of the privilege is to protect innocent men," *Grunewald v. United States*, *supra*, at 421, particularly in the circumstances in which it was invoked by petitioner. *Id.*, at 422-423; see also *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-56. Thus, the classification of the State is left without rational justification on the basis of any peculiar status of petitioner as an attorney or because of any peculiar relationship between him and the Judicial Inquiry which sought to strip him of either his privilege or his profession.

Finally, a classification disqualifying attorneys from the exercise of a constitutional right while preserving that right for other citizens ignores a basic interest of society. As this Court stated in *Konigsberg v. State Bar*, 353 U.S. 252, 273, "[a] bar composed of lawyers of good character

is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be un-intimidated—free to think, speak, and act as members of an Independent Bar.” Surely it would not be contended that the attorney’s status strips him of his constitutional right to criticize the courts in good faith while others enjoy that right. Compare *Garrison v. Louisiana*, 379 U.S. 64, with *New York Times Co. v. Sullivan*, 376 U.S. 254; cf. *In re Sawyer*, 360 U.S. 622. It would be an equally unacceptable denigration of the privilege against self-incrimination if the states were free to determine that its exercise is consistent with the duties of a layman but not with those of an attorney.<sup>18</sup> There is, we submit, no rational basis that supports such a determination, and the State’s action must fall as an invidious discrimination against attorneys prohibited by the equal protection clause of the Fourteenth Amendment.

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<sup>18</sup> As to the duty of cooperation which was owed to authority by English citizens in connection with the history of the privilege against self-incrimination:

“[The Englishman] might owe to authority a duty to bear witness as to matters external to himself; but he could not be compelled to answer as to his own life: particularly his religious and political beliefs.

“An Englishman’s home was his castle; his life was his inviolable temple. Where his life, his freedom from official restraint, his beliefs and opinions were at issue, he was no longer a subject of the state. He himself was a sovereign. He had the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit; and to defend himself by all means within his power—including the instrument of silence. He could rest on the presumption of innocence. He could put the state to its proof. The state and he could meet, as the law contemplates, in adversary trial, as equals—strength against strength, resource against resource, argument against argument. The duty to cooperate came to an end at the threshold of conflict between the state and the individual.” Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 Clev. B. A.J. 91, 98 (1954).



### III. The Invalidity of Petitioner's Disbarment Is Not Affected by the State's Rule Requiring Attorneys to Keep Records.

#### A. *The Judgment May Not Be Affirmed Upon the Sole Ground That the Privilege Did Not Apply to Petitioner's Records.*

The Appellate Division explicitly recognized that petitioner had "an absolute right to invoke his constitutional privilege against self-incrimination and to refuse" to testify and to produce the records for which the subpoena called, but it held that he could nonetheless be disbarred for exercising that "absolute" right. In its memorandum order of affirmance, however, the Court of Appeals relied upon the *Cohen* case and "on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him. . . . [R.86]" Thus, the Court of Appeals reversed the Appellate Division's holding that the privilege was applicable to petitioner's refusal to produce records, although it agreed with the holding that the privilege applied to his refusal to testify.

Assuming *arguendo* that the Fifth Amendment privilege as to production of petitioner's records was removed by virtue of the so-called required records doctrine established in *Shapiro v. United States*, 335 U.S. 1, nothing in that doctrine would operate to remove the testimonial privilege, either in general or with reference to testimony about the required records. *Shapiro v. United States*, *supra*, at 27; *Curcio v. United States*, 354 U.S. 118.

Petitioner asserted both a testimonial and a documentary privilege before the Judicial Inquiry. The charge against him was a "refusal to answer questions and to produce the records" called for by the subpoena (R.7). The order of disbarment was entered "on the basis of the Referee's



unchallenged finding that [petitioner] refused to testify and to produce his record [R.83]." Thus it is clear from the order of the Court of Appeals, as well as its amended remittitur, that its affirmance of the disbarment order was based both upon petitioner's conceded right to refuse to testify and his refusal to produce his records. Otherwise reliance upon the *Cohen* case, which held that an attorney may be disbarred even for a refusal to testify based upon a *valid claim* of privilege would have been neither necessary nor appropriate.

If this Court accepts our previous argument that petitioner could not constitutionally be disbarred for his refusal to answer questions, then the fact that the disbarment order was also based in some inestimable degree upon an unprivileged refusal to produce records would not permit affirming the judgment below, which "must be affirmed as to both or as to neither." *Thomas v. Collins*, 323 U.S. 516, 529; see *Williams v. North Carolina*, 317 U.S. 287, 292; *Stromberg v. California*, 283 U.S. 359, 367-368; cf. *Jackson v. Denno*, 378 U.S. 368; *Fahy v. Connecticut*, 375 U.S. 85. Since the court below passed upon respondent's belated claim that petitioner's privilege did not apply to the so-called required records, however, and in order ultimately to resolve the controversy between the parties to this case, the Court may well believe it appropriate to resolve the question whether the record-keeping requirement of Rule 5 of the Appellate Division operated to remove the privilege from the records which petitioner refused to produce before the Judicial Inquiry. We contend that it did not, since the *Shapiro* case should be overruled for reasons discussed below, and since, even if there remains some validity to the required records doctrine, that doctrine does not apply to records involved here. Further, even if the Court rejects both of the above arguments, the judgment must be reversed under the doctrine of *Raley v. Ohio*, 360 U.S. 423.

**B. The Required Records Doctrine is an Unwarranted Limitation Upon the Scope of the Privilege Against Self-Incrimination.**

The required records doctrine, briefly stated, is that the Fifth Amendment privilege of an individual to refuse to produce his private papers may be removed by a governmental requirement that those papers be kept by him. Although the doctrine earlier had been approached by lower courts, see Note, *Quasi-Public Records and Self-Incrimination*, 47 Colum. L. Rev. 838 (1947), it was established and applied by this Court for the first—and last—time in *Shapiro v. United States*, 335 U.S. 1. There the Court held that the privilege did not apply to sales records required to be kept by food licensees under wartime regulations of the Office of Price Administration, since the records had lost their character as private papers and acquired “‘public aspects.’” *Id.* at 34. The case involved a fruit and vegetable wholesaler licensed under the Emergency Price Control Act, 56 Stat. 23, who was tried on charges of making tie-in sales in violation of OPA regulations. He contended that, because he had produced, under subpoena, sales records required to be kept by him under OPA regulations and had been assured that he thus received the immunity which flowed from the immunity provisions of the Act, he could not be prosecuted for violations disclosed by the records. The Court, in a long opinion devoted to the interpretation of the immunity provisions of the Act, rejected his contention that the Act granted immunity to persons who produced records required to be kept by regulations under the Act. Noting that petitioner had not duly raised the question, 335 U.S., at 32, the Court then held that the Act was constitutional as thus construed. It assumed that “there are limits which the Government cannot constitutionally exceed in requiring the keeping of records

which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper," *ibid.*, but held that the bounds were not exceeded in that case.

The principal authorities relied upon by the court were *Wilson v. United States*, 221 U.S. 361, and *Davis v. United States*, 328 U.S. 582. The latter case involved a claim, rejected by the Court, that gasoline ration coupons introduced in evidence in a trial for unlawful possession of those coupons were the product of an unreasonable search and seizure. The Court found that the coupons were issued by the government under regulations providing that they did not become the property of the custodian but remained government property, subject to inspection and recall, and held, relying upon the *Wilson* case, that the custodian of public documents was not privileged under the Fifth Amendment to refuse to produce them, even though he might thereby be incriminated.

The *Wilson* case was decided shortly after *Hale v. Henkel*, 201 U.S. 43, which held that a corporation could not claim the privilege and that a corporate officer could not, therefore, resist production of documents on the ground that the corporation might be incriminated. *Wilson* extended this doctrine and held that a corporate officer has no Fifth Amendment privilege to refuse to produce the records of the corporation which are in his custody, even though they might incriminate him, since his mere custody does not make the corporation's papers his own and since the corporation has no privilege. Thus, the holding in neither *Davis* nor *Wilson* furnished any substantial support for the conclusion in *Shapiro* that the private records prepared by a non-corporate businessman for use in the conduct of his affairs can somehow be transformed into public documents—such as ration coupons issued by the government—or that the individual can be



transformed from an owner to a mere custodian—such as a corporate officer—by the simple expedient of an administrative regulation requiring that such records be kept.

The Court in *Shapiro* did not rely upon the holdings in either *Wilson* or *Davis*, however, nor did it base its decision upon any analysis of those cases. Rather, it relied upon a dictum from *Wilson*, 221 U.S., at 380, which was quoted later in *Davis*, 328 U.S. at 589-590, that “the privilege which exists as to private papers cannot be maintained in relation to ‘records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.’ ” 335 U.S., at 33. A dissenting opinion in *Shapiro* made an exhaustive analysis indicating the inapplicability of the *Wilson* dictum, and of the English and state cases cited by the Court in *Wilson* in support of it, to the kind of records involved in *Shapiro*, see 335 U.S., at 58-62 (dissenting opinion of Frankfurter, J.), and we can add nothing to that analysis.<sup>19</sup> As Mr. Justice Frankfurter demonstrated, the dictum went far afield from the question actually decided in *Wilson*—that a corporate officer could not resist a government demand for production of corporate documents in his custody even though the documents might incriminate him. The Court in *Wilson* noted that Wilson’s custody as an officer was subject to the control of the corporation and also that the directors had formally demanded possession from Wilson for the purpose of producing the

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<sup>19</sup> We do note, however, that the portion of the *Wilson* dictum quoted in *Shapiro* referred to a further application of the principle that, “in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection. . . .” *Wilson v. United States*, *supra*, at 380. Petitioner is not, of course, a public official by virtue of holding a license from the State, see *Cammer v. United States*, 350 U.S. 399.



documents. 221 U.S., at 376, 385. Thus, the dictum was intended to show only that a custodian of documents to which another has a greater right of possession may not resist production on Fifth Amendment grounds when the owner, itself, may not resist production on those grounds.

The fundamental defect of *Shapiro*, however, lies not in the fact that it rested in large part upon a questionable dictum; rather, that defect lies in *Shapiro's* inconsistency with prior and subsequent cases decided by this Court and in the absence of any rationale for the doctrine which is consistent with the Court's recognition that the privilege is to be liberally rather than narrowly interpreted. As we have noted, the Court has not, since deciding *Shapiro*, explained or applied the doctrine established there, although the lower courts have applied the doctrine with conflicting results. See *Securities & Exchange Commission v. Olsen*, 354 F. 2d 166 (2d Cir.); *Russell v. United States*, 306 F. 2d 402 (9th Cir.); *United States v. Clancy*, 276 F. 2d 617 (7th Cir.), reversed on other grounds, 365 U.S. 312; *Beard v. United States*, 222 F. 2d 84 (4th Cir.), cert. denied, 350 U.S. 846; *United States v. Remolif*, 227 F. Supp. 420 (D. Nev.); *United States v. Ansani*, 138 F. Supp. 451 (N.D. Ill.).<sup>20</sup> Examination of the *Shapiro* rationale thus has been left largely to the commentators, who, while they have

<sup>20</sup> One commentator relies in part upon the *Clancy* case in support of his contention that the federal government has been unwilling, in recent years, to test the *Shapiro* doctrine in this Court. See Edgar, *Tax Records, the Fifth Amendment, and the Required Records Doctrine*, 9 St. Louis L. J. 502, 507-508 (1965). In *Clancy*, 276 F. 2d, at 630-631, the Court of Appeals affirmed denial of a motion to suppress as to records required to be kept under the federal wagering tax laws and regulations thereunder, relying upon *Shapiro*, but this Court's reversal on other grounds led it not to reach petitioners' challenge to the court's holding. 365 U.S., at 316. The Edgar article notes that the United States, in its brief in opposition to the petition for certiorari, cited *Shapiro*, but in its brief on the merits it specifically disclaimed reliance on the Court of Appeals' position that the records involved were not protected by the Fifth Amendment privilege. See p. 53, n. 23, *infra*.

disagreed as to whether the doctrine should be wholly repudiated, almost uniformly have found that no logical rationale has been advanced in support of the doctrine. See, e.g., Edgar, *Tax Records, the Fifth Amendment, and the Required Records Doctrine*, 9 St. Louis L. J. 502 (1965); Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum. L. Rev. 681 (1965); Comment, 9 Stan. L. Rev. 375 (1957); Note, 68 Harv. L. Rev. 340 (1954); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687 (1951).

The two possible bases for the required records doctrine, as for any doctrine inhibiting exercise of the privilege, see *Rogers v. United States*, 340 U.S. 367, 376-377 (dissenting opinion of Black, J.), are a broad application of the doctrine of waiver and a narrow interpretation of the scope of the privilege. The waiver theory is that an individual, by choosing to engage in an activity in which the government requires keeping and production of records, thereby waives his privilege as to such records. The Court in *Shapiro* did not apply the waiver analysis, perhaps because petitioner had no notice that he might be waiving his privilege but rather was led to believe that his production of records would confer immunity upon him. But in any event the proposition that the government may force a waiver of a fundamental personal liberty upon an individual as a condition of permitting him to engage in an occupation which requires a license from the government merely assumes the answer to the basic question which must be determined—whether the governmental coercion involved is inconsistent with the protection guaranteed by the privilege. Cf. Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

The arbitrary character of the waiver theory is particularly apparent in its application to this case. In order

to find that petitioner waived his privilege as to the records sought by the subpoena, one must say first that, by a rule enacted in 1940, the State could force petitioner either to waive his privilege against self-incrimination or abandon a profession in which he had engaged since 1926. Second, the waiver must be implied despite the absence of any notice in the rule that such a waiver was part of the record-keeping requirement and despite the fact that the New York Court of Appeals had previously rejected the position that a record-keeping requirement made inapplicable the State privilege against self-incrimination. See *People ex rel. Ferguson v. Reardon*, 197 N.Y. 236, 90 N.E. 829. Finally, the waiver must be found despite the fact that petitioner asserted his privilege before the Judicial Inquiry and was advised by the Presiding Justice that he had a perfect right to plead it. Thus, unless the elements of knowledge and voluntariness are wholly eliminated from the requirements for a valid waiver, the theory cannot apply to petitioner. See *Miranda v. Arizona*, 384 U.S. 436, 475-476; *Stevens v. Marks*, 383 U.S. 234.

The *Shapiro* case, however, was not based upon a broad waiver doctrine but rather upon the second technique for reducing the protection of the privilege. The scope of the privilege was defined to exclude, as not private or personal in character and thus not within the privilege, documents required by law to be kept by individuals.<sup>21</sup> The full extent

<sup>21</sup> The waiver theory may have been the basis of the Court's rejection of Fifth Amendment claims in a closely related area but under different circumstances. In *United States v. Kahriger*, 345 U.S. 22, and *Lewis v. United States*, 348 U.S. 419, the Court upheld federal wagering tax statutes which require registration with the government and payment of an occupational tax as a condition precedent to accepting wagers, holding that the requirements must be met before any incriminating acts are committed and the privilege protects only disclosure of past acts. In *Costello v. United States*, No. 41, OT 1966, the Court has granted certiorari limited to the question whether the *Kahriger* and *Lewis* cases should be overruled. 383 U.S. 942.



to which the Fifth Amendment privilege has been deprived of its force depends upon the nature of the limits upon governmental power to which the Court referred but which it did not explain in *Shapiro*, 335 U.S., at 32. Under a broad reading of *Shapiro* any kind of document prepared by a private individual which would reasonably aid in the enforcement or administration of a legitimate governmental regulatory program may be required to be kept by that individual *and* may thus be deprived of the protection of the Fifth Amendment privilege. But the potential limitation upon the scope of the privilege, while great at the time *Shapiro* was decided, is constantly expanding as the area of individual activity which is outside the bounds of governmental regulatory power decreases. And when it is realized how pervasive federal and state regulation has become and how few activities may be carried on without a license of some sort, with an accompanying record-keeping requirement, it becomes evident that if the doctrine is allowed to stand, "there is little left to either the right of privacy or the constitutional privilege." *Shapiro v. United States*, 335 U.S., at 10 (Frankfurter, J. dissenting). The record-keeping requirements imposed upon the public by the federal government alone are contained in a digest which comprises 68 pages, plus a 14 page index. See 31 Fed. Reg. 4000-4085 (March 8, 1966), revising 1 C.F.R. Appendix A. The digest states, moreover, that it excludes various types of requirements, see 31 Fed. Reg., at 4002.

We do not contest that the privilege applies only to private and not public documents, but the characterization of required records as not private cannot be harmonized with the definition of "private" as recognized in *Boyd v. United States*, 116 U.S. 616, which established that private papers are protected by the privilege. The document which the Court in *Boyd* held privileged against compulsory production was an invoice of certain cases of glass which had been



imported into the country. Just as in *Shapiro*, the document was prepared by a private businessman for use in his business; just as in *Shapiro*, the business involved was one which was regulated by the federal government; and, in a sense indistinguishable from *Shapiro*, the document was a "required record."<sup>22</sup> But the distinction in *Boyd* between private papers and those which were without the protection of the Fourth and Fifth Amendments did not relate to mere governmental requirements that documents relating to a business regulated by the government be kept and produced. *Boyd* regarded the protection of the privilege as withheld only with respect to items which the government was entitled to seize and possess, such as stolen property and excisable articles. 116 U.S., at 623-624.

The Court in *Shapiro* could, of course, have overruled *Boyd*, but it did not purport to do so and the continued vitality of *Boyd*, as "one of the greatest constitutional decisions of this Court," has generally been accepted. *Schmerber v. California*, 34 U.S. L. Week 4586, 4591 (June 20, 1966) (dissenting opinion of Black, J.); see *id.*, at 4588.

<sup>22</sup> The government in *Boyd* had sought compulsory production of the invoice under Section 5 of the Act to amend the customs-revenue laws and to repeal moiety laws, 18 Stat. 187, which provided as follows:

"That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the Attorney representing the government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion . . . and thereupon the court . . . may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court. . . ."

Sections 9 and 10 of the same Act prohibited the entry into the United States of any foreign goods valued in excess of \$100 "without the production of an invoice thereof as required by law" or an affidavit showing why such invoice could not be produced and showing the actual cost or foreign market value of the goods. 18 Stat. 188. For a discussion of the history of the above statutory provisions and the administrative regulations relating to invoices at the time *Boyd* was decided, see Mr. Justice Frankfurter's dissenting opinion in *Shapiro*, 335 U.S., at 68, n. 19.

Therefore *Shapiro* stands as a grave departure from *Boyd* and an unwarranted limitation upon the scope of the privilege as delimited in *Boyd*, and also as inconsistent with the Court's previous and subsequent injunctions that the privilege is to be interpreted broadly. See *Miranda v. Arizona*, 384 U.S. 436, 461, and cases there cited.

*Shapiro* moreover, is inconsistent with this Court's recent decision in *Albertson v. SACB*, 382 U.S. 70, which held unconstitutional, as inconsistent with the Fifth Amendment privilege, a federal statute and orders thereunder requiring the completion and filing with the government of registration statements by members of the Communist Party. The Court cited cases in which it had held that witnesses could not be compelled to testify as to Communist Party membership or association and held that, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." *Id.*, at 78. That holding in itself is inconsistent with *Shapiro*, which established just such a constitutional difference between compelling oral testimony and compelling documentary evidence. 335 U.S., at 27.

*Shapiro* found that the Fifth Amendment privilege did not prohibit a requirement that an individual produce for government inspection documents which would incriminate him, because "there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." 335 U.S., at 32. Putting aside the fact that this analysis ignores the critical distinction between the power to require records to be kept and the power to deprive those records of the protection of the Fifth Amendment, the situation in *Albertson* appears

clearly to fall within this rationale. The Court in *Communist Party v. Control Board*, 367 U.S. 1, 88-103, established both the extensive power of Congress to regulate the activities of the Communist Party and the reasonable relationship of registration and disclosure requirements to the interests sought to be protected through that regulation. The Court in *Albertson*, however, held that registration by individuals could be required only if the government supplanted the privilege by immunity which supplied a complete protection against all the perils against which the privilege guarded. Thus, unless there is some constitutional difference between requiring the keeping of records which must be surrendered upon the government's call and requiring the filing of reports with the government, the decision in *Albertson* must be regarded as a conflict with *Shapiro* which justifies explicit overruling of that case.<sup>23</sup>

It may be argued that repudiating the required records doctrine would interfere with the regulatory programs of the federal and state governments. The short answer to that argument, of course, is that the Fifth Amendment privilege is not to be weighed against countervailing interests. It is a right which "cannot be abridged." *Miranda v. Arizona*, 384 U.S., at 479. Even if such a consideration were relevant,

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<sup>23</sup> We are able to find no difference for purposes of the Fifth Amendment privilege between such a record-keeping requirement and a report-filing requirement, and we note that the government in the *Shapiro* case found no such distinction:

"The weakness of petitioner's argument would be even more clearly demonstrated if, as is conventional under many types of federal and state regulations, he had been required by law to file periodic reports. . . . His argument here would logically drive petitioner to the untenable contention that such reports could not be utilized by the Administrator without clothing petitioner with an immunity from prosecution for offenses disclosed by the reports. Regulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated." Brief for the United States, p. 20, n. 7.

We also note, however, that the government's brief in *Albertson* did not cite the *Shapiro* case.



however, it is unlikely that repudiation of the doctrine would impair in any substantial way the administration or enforcement of regulatory programs. Subject to the requirements of other constitutional provisions, the government could still require the keeping of records, and such records could be withheld from production only by natural persons who chose to claim the privilege and as to whom the government was unwilling to grant immunity. There would be no effect upon the principal subjects of regulatory programs, since corporations and unincorporated associations such as labor unions and partnerships are not entitled to claim the privilege. See *Wilson v. United States*, 221 U.S. 361; *United States v. White*, 322 U.S. 694; *United States v. Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807.

C. *Assuming the Required Records Doctrine Retains Some Validity, the Doctrine Does Not Apply to the Records Involved in This Case.*

Should the Court reject our argument that the required records doctrine must be repudiated entirely through overruling the *Shapiro* case, the Court's recent decisions establishing the fundamental values reflected in the privilege and the broad, liberal application which it must be given require at least that the doctrine be construed very narrowly and limited in its application to substantial governmental interests which can be effected through no means other than a restriction of the scope of the privilege. See Comment, 9 Stan. L. Rev. 375 (1957); Note, 68 Harv. L. Rev. 340 (1954); compare *Aptheker v. Secretary of State*, 378 U.S. 500, 508; *Shelton v. Tucker*, 364 U.S. 479. In light of the *Albertson* case, it is difficult to conceive of the kinds of cases that would fall within the limits of a required records doctrine that is so narrowly confined, but it is apparent that this case cannot be within such limits. As we have pointed out previously, the State has made no showing that produc-



tion of the documents called for in the subpoena is essential, or indeed even necessary, to the enforcement of the standards of the Kings County bar and that the information already available through pleadings and statements of retainer is not adequate to permit the Judicial Inquiry to establish any wrongdoing through investigation and development of independent evidence.

This case differs from *Shapiro* both in the type of activity involved and in the type of records required to be kept. *Shapiro* dealt with a complex, nationwide system of price controls affecting varying industries and commodities with varying methods of operation. This case involves the standards of ethics to be maintained by attorneys practicing in a limited class of cases in the Second Judicial Department of the State of New York. Thus, the factors which might justify a partial limitation of the privilege in *Shapiro* because of the complexity, character and broad geographic application of the regulatory scheme involved, and a consequent frustration of enforcement in the absence of requiring keeping and production of records, are not present in this case. At the same time, the record-keeping requirements in *Shapiro* were comparatively narrowly drawn. Thus the Court in that case emphasized that the record involved there was a sales record which "recorded" a transaction in which the petitioner could engage solely by virtue of a license granted under the statute which required the records to be kept, 335 U.S., at 35, and the government's brief noted that the petitioner was not required to keep records of his private affairs or his other business affairs but was required solely to "keep and make available for inspection records relating to the prices at which he sold price-controlled fruits and vegetables." Brief for the United States, p. 13. In contrast, the records sought here serve no recording function. That function had already been fulfilled by other documents filed by petitioner apart from

the requirements of Rule 5. Rule 5, as implicitly interpreted by the Court of Appeals through its application of the required records doctrine to the documents sought in the subpoena, includes petitioner's day book, cash receipts book, cash disbursements book, check book stubs, petty cash book and vouchers, general ledger and journal, cancelled checks and bank statements, pass books and other evidences of accounts, record of loans made, payroll records, and state and federal tax returns and work sheets relative thereto. Thus, the State's record-keeping requirement is not narrowly limited to the precise area in which it has a legitimate interest but rather "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms" under the Fifth Amendment. *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307. We contend that, even if *Shapiro* retains some validity, it should not be extended to cover the type of records required to be produced here.

*D. Affirmance of the Judgment on the Ground That Petitioner Had No Privilege to Refuse to Produce His Records Would Be a Denial of Due Process of Law.*

Even if *Shapiro* is valid and applicable to the records involved here, affirmance of the judgment on the ground that petitioner had no privilege to refuse to produce his records would be violative of the due process clause of the Fourteenth Amendment, in light of the procedure followed in this case. As we have stated, petitioner had no notice until after the close of the hearings before the Judicial Inquiry and the hearing before the referee that the State might contend that he had no privilege to refuse to produce his records. The Presiding Justice at the Judicial Inquiry had advised him, with no objection from the State, that the privilege did apply, and, while respondent later raised the issue of applicability of the privilege, the Appellate Division held that the privilege did apply. Apart from

any notice from the courts or respondent, petitioner had no notice from the opinions of any of the courts in the *Cohen* case that the privilege did not apply to production of records, though *Cohen* involved a refusal to produce records as well as a refusal to testify. See 366 U.S., at 120. Further, the controlling New York law established that, notwithstanding a requirement that records be kept, the privilege applied to such records. *People ex rel. Ferguson v. Reardon*, 197 N.Y. 236, 90 N.E. 829. And finally, a comparison between the documents called for by the subpoena and the documents required by Rule 5 would have made it apparent, even to the most cautious attorney concerned with adherence to a broad *Shapiro* doctrine, that he was not being asked to produce the documents required to be kept since the subpoena reached much further. Compare *Hubner v. Tucker*, 245 F. 2d 35 (9th Cir.).

Thus, until the Court of Appeals' decision, petitioner had been led to believe that he faced disbarment only as a consequence of his refusal to relinquish a valid claim of the privilege against self-incrimination under a decision which was specifically discredited by *Malloy v. Hogan*, 378 U.S. 1, 11. But the Court of Appeals, in an implicit construction of Rule 5 which broadened its application far beyond the language of the rule, held that petitioner had no privilege at all with respect to the records which the State sought to coerce him to produce under pain of disbarment. The procedure here is strikingly similar to that in *Raley v. Ohio*, 360 U.S. 423, in which the agency before which the appellants appeared advised them that they had a right to rely upon the State privilege, after which the State Supreme Court held that they were not protected by the privilege and thus had committed an offense in refusing to answer the questions put to them. To sustain the judgment here would be to sanction the same "indefensible sort of entrapment by the State" which the Court refused



to sustain in *Raley* as inconsistent with the requirements of the Fourteenth Amendment. *Id.*, at 426; see also *Stevens v. Marks*, 383 U.S. 234.

### Conclusion

For the reasons discussed above the judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

LAWRENCE J. LATTO  
WILLIAM H. DEMPSEY, JR.  
MARTIN J. FLYNN  
734 Fifteenth Street, N. W.  
Washington, D. C. 20005  
*Attorneys for Petitioner.*

### Of Counsel:

BERNARD SHATZKIN  
235 East 42nd Street  
New York 17, New York

SHEA & GARDNER  
734 Fifteenth Street, N. W.  
Washington, D.C. 20005

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1966

**No. 62**

SAMUEL SPEVACK,  
*Petitioner,*

v.

SOLOMON A. KLEIN,  
*Respondent.*

*On Writ of Certiorari To The Court of Appeals  
of the State of New York*

**AMICUS CURIAE BRIEF OF  
AMERICAN TRIAL LAWYERS ASSOCIATION**

ISRAEL STEINGOLD  
*Of Counsel*

Town Point Building  
111 W. Main Street  
Norfolk, Virginia

*Counsel for American Trial Lawyers  
Association*

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**STATEMENT OF AMICUS CURIAE  
AMERICAN TRIAL LAWYERS ASSOCIATION**

The American Trial Lawyers Association respectfully submits that it is vitally interested in the Constitutional questions involved in this case, for the reasons hereinafter stated.

This brief is submitted pursuant to Rules 35 and 42 of the Revised Rules of this Court. Both Petitioner and Respondent have consented to the filing of this brief as amicus curiae, the consents having been filed with the Clerk of this Court.

The American Trial Lawyers Association is a national bar association with a current membership in excess of 25,000. Its prime function is to preserve the fundamental rights of men in their persons and property under law through the art of advocacy.

It is felt that the questions raised in this case present squarely the right of the legal profession to that independence necessary for it to function efficiently as an arm of the court, without fear of reprisal, asking no special considerations, but expecting the same Constitutional rights and protection accorded all other persons or groups of persons without discrimination.

The lawyer, traditionally, has been the protector of the rights of men, civil and criminal. When despotic governments have sought to stifle freedom and destroy property rights their first target has been the legal profession. Where the lawyers' status has been demeaned and his independence destroyed by fear of reprisal, the status of the judiciary has followed suit. Until recent times we felt that the debasing of human rights was ancient history, a condition which would never be repeated. It is being repeated now, in our time, in many areas of the world. Its corroding influence is contaminating.

The present case is one of a series which promises to become a flood if not halted, which seeks to place the American advocate in the unenviable position of being subjected to intimidation by certain organized groups who control most bar associations. Their weapon is insidious. Their argument is that the lawyer, because he has been characterized as an officer of the court, has no individual Constitutional rights as between himself and his superiors, the judges and the bar association committees.

The American Trial Lawyers Association does



not condone unethical practices, but it does condemn witch-hunting for the purpose of intimidating the trial bar. It seeks to police the conduct of its membership by as strict a code of ethics as is consonant with the rights of those requiring legal services.

The American Trial Lawyers Association seeks to be heard in this case because there is here demonstrated by concrete example the excesses to which overzealous brethren at the bar will go to destroy competing groups. By the device used in this case a lawyer may be faced with the choice of surrendering his Constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments, or, by asserting such rights, lose his livelihood by loss of the right to practice his profession. The Petitioner here has been disbarred by the courts of the State of New York because he relied on his Constitutional rights in refusing to submit to an inquisition by a judicial inquiry or to surrender his books and records.

### **QUESTIONS PRESENTED**

1. Whether the disbarment of an attorney solely because of his refusal, based upon a good faith claim of the privilege against self-incrimination, to testify and to produce records before a State Judicial Inquiry is in violation of the self-incrimination clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment.

2. Whether, assuming the Fifth Amendment standard does not of itself preclude the disbarment of an attorney under such circumstances, the disbarment

is nonetheless a deprivation of due process of law or equal protection of the laws under the Fourteenth Amendment.

3. Whether a proceeding for disbarment instituted by a petition, alleging only generally acts of professional misconduct, without reference to specific acts, time, or place, is not void as a violation of the Sixth Amendment requiring confrontation by witnesses, the proceeding being dependent entirely on possibility of evidence to be obtained by search and seizure of the lawyer's records, in violation of the Fourth Amendment, or by requiring him to testify against himself, in violation of the Fifth Amendment.

#### **STATUTES INVOLVED**

The Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are here involved, in addition to Special Rule V of the Supreme Court of New York, Appellate Division, Second Department, part of which are printed in Appendix E of the Petition for a Writ of Certiorari, and the remainder in Appendix A of this brief.

#### **STATEMENT OF THE CASE**

The factual statement of the case as set forth in Petitioner's Brief is adopted.

## **ARGUMENT**

### **I. THE PRINCIPLE AT ISSUE IS OF NATIONAL IMPORTANCE**

That the principle involved in this case is of critical importance to the trial bar is obvious. However, it is also of critical importance to our very form of government because of its implications.

For the same reason that the judiciary must remain inviolate, so must the practice of law. Is there any doubt in the minds of this highest court of our land why the Founders considered it necessary to include in the Constitution the provisions that the Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and that their Compensation "shall not be diminished during their Continuance in Office?" (Art. III. Sec. 1)

It is because of these safeguards written into the Constitution that our federal judiciary is independent. Its independence is one of the bulwarks of our form of government. Neither a demanding executive nor a rampaging legislative branch has the power to influence forcibly the actions or decisions of the Court. For essentially the same reasons the bar of the United States should be free and independent. Through it, matters of vital importance to our lives, liberty, property and happiness come before the courts. And that branch of the bar which may most accurately be designated as the arms or officers of the court are that great body of advocates, the trial lawyers of America. It is they who

defend the accused and lend their services to establish, maintain and protect the rights of our people in their many forms of contact with each other and with the sovereign.

If the advocate is permitted to be intimidated by an opposing segment of the bar without the right to the protection of the Constitution afforded even the vilest criminal, we are indeed sowing the seeds for the decay of our constitutional system in its present form. Unpopular causes will find few courageous enough to risk the wrath of the majority of the organized bar by exposing themselves to loss of reputation or profession, with attendant disgrace to their families, and loss of means of a livelihood which follows disbarment.

Of what value then is an independent judiciary if those through whom it must function dare bring before it only matters involving rights and principles which are approved by the popular hysteria of the moment, or by the entrenched majority groups of the bar associations who control the machinery of the bar and can whip into line any dissident elements of the bar by threat of judicial inquiry? To many of that aristocracy of the bar the democratic system is a necessary evil. By them this Court is villified because of its adherence to the philosophy of the most sublime document ever devised by the mind of man, the Constitution of the United States. Those of the Bar who espouse the basic rights of free men on Constitutional grounds are considered radical and viewed with contempt by the ruling groups.



## **II. THE JUDICIAL INQUIRY IS A THINLY DISGUISED FORM OF ATTACK ON THE CONTINGENT FEE SYSTEM.**

By far the greatest volume of litigation in our courts today involves one branch or another of tort law. In this field of the law justice is a tangible thing to the multitude. By far the greatest percentage of the injured and the maimed, and the widow and the orphan of the wrongful death victim, are indigent or unable to afford the luxury of retaining counsel on a flat-fee basis. The life-line extended by the legal profession to these millions of victims of the carnage wrought by our mechanized, jet, atomic form of society is the contingent fee system.

Using possible abuse of the contingent fee system, and the theory that the lawyer is an officer of the court, as legalistic justification, the courts of New York are being used as one of the springboards for a national campaign to destroy the contingent fee system. If the plaintiff's advocate can be kept under pressure, the first step toward this end will lead but to the next, toward its final destruction by default.\*

## **III. THE JUDICIAL INQUIRY SYSTEM EN- COURAGES ANONYMOUS AND IRRE- SPONSIBLE HARASSMENT AND VIOLATES THE FOURTH, FIFTH AND SIXTH AMENDMENTS**

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\*See attack on contingent fee system by James S. Kemper, Jr., speech delivered at Williamsburg, Va., June 6, 1966, excerpt, XIV Virginia Bar News, No. 8, p.4.

In a great city where, by the law of averages, some abuses must occur, a major step has been taken. That ancient device of intimidation, known as the "Judicial Inquiry", has been resurrected. Upon petition to the Kings County Supreme Court, initiated by a petition, *based upon "information and belief,"* subpoena may be directed to any lawyer in its jurisdiction to produce *carte blanche*, financial records and "all other deeds, evidence and writings, which you have in your custody or power, concerning the premises," for any fixed period, upon pain of disbarment for failure to produce and testify against himself. (Tr. pp. 1-2)

The imposing title of such petition in this case is, "The Petition of the Brooklyn Bar Association for A Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice . . . ", pursuant to Section 90 of the Judiciary Law. The petition alleges *nonspecific, shotgun type violations* of the rules of court and of *the code of ethics*, in general terms<sup>1</sup>, *depending for proof entirely on the alleged right to force a lawyer to produce evidence against himself and to testify against himself.*

The irony is that the legal profession, by that same "code of ethics", must advise a client of his privilege not to produce evidence against himself or to testify against himself. But to destroy the very right which the lawyer is honor and duty-bound to espouse to the utmost of his ability, that branch of the profession opposed to the contingent fee system is willing to risk destruction of the freedom and independence of the en-

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<sup>1</sup> Transcript, pp. 8-9

tire legal profession. This, it follows, must ultimately leave the judiciary impotent to carry out its great duty of enforcing the guarantee to every man of the protection of the Constitution which it now enjoys.

In this self-destructive role the New York bar group has had nurture in the decisions of this court in *Konigsberg v. California*,<sup>2</sup> and *Cohen v. Hurley*.<sup>3</sup> Fortunately for posterity is the system which guarantees the independence and fearlessness of our Federal judiciary, and particularly fortunate are we in the choice of the men who have had the conscience and the ability eloquently to voice their dissents from the rulings of the majority, for future events have often proved the wisdom of the great dissenters. Thus, in classic tradition we have the clairvoyant dissent of Justice Black in *Hurley*.

The sweeping nature of the subpoena in this case strikes at the very foundation of the constitutional guaranty of the Fourth Amendment against unreasonable searches and seizures. *Schwimmer v. United States*, (CA 8, 1956) 232 F 2d 855, 860, certiorari denied 77 S.Ct. 48, 352, U.S. 833, 1 L. ed 2d 52; *Boyd v. United States*, 116 U. S. 616, 622, 6 S. Ct. 524, 29 L. ed 746; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 S.Ct. 370. In the *Hale* case it was held that the subpoena duces tecum served on Hale as secretary of MacAndrews & Forbes Co. in an anti-trust proceeding was far too sweeping in its terms and violated the test of reasonableness, an unreasonable search and seizure under the Fourth Amendment.

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<sup>2</sup>366 U.S. 36 (1961)

<sup>3</sup>366 U.S. 117, 123 (1961)

Granting a *carte blanche* subpoena to any grand jury or bar association *on suspicion* to compel production of a lawyer's books, records and personal papers violates the test of reasonableness. It can proceed only on theory that the end justifies the means, a moral concept always condemned by this court. To permit such procedure requires a lawyer to become a witness against himself in what amounts to a criminal case.

#### IV. THE PUNISHMENT IS OF A CRIMINAL NATURE

While there may be specious argument seeking to differentiate between loss of reputation, property rights and the right to the pursuit of happiness on the one hand, and actual physical incarceration or a fine on the other, it must be conceded that the difference is purely semantics, a play on words. Honesty and justice demand that we recognize truth, and the truth is that there is no material difference between punishment by disbarment of a lawyer and a horrendous fine. Where a lawyer with years of investment in building up a lucrative law practice has had it snatched away, the penalty is horrendous. And in order not to be misunderstood, the definition of "horrendous" is, "To be regarded with horror; dreadful; terrible; horrible." (The Century Dictionary). It is in a class by itself as a cruel and unusual punishment. This Court has held that "exclusion from any of the professions . . . for past conduct can be regarded in no other light than as punishment for such conduct." *Ex Parte Garland*, 4 Wall, 333, 377; see *Cummings v. Missouri*, 4 Wall, 277, 322; *In re Leszynsky*, 16 Blatch, 19, F. C. 8, 279.



The nature of the punishment is graphically described by Justice Black in *Hurley* at pages 145, 148, 153 of 366 U. S.

What Justice Black feared in his dissent in *Cohen v. Hurley*, supra, has now come to pass. In that case, a proceeding similiar to this, Cohen refused to testify or to produce records. He invoked his state constitutional privileges. The penalty was discipline by the New York Appellate Division in the form of disbarment. He was disbarred, not because he invoked his constitutional privilege against self-incrimination, but rather, because he deliberately refused to cooperate with the Court by refusing to waive his constitutional privilege. 366 U. S. at page 122.

Such argument seeks to divide the lawyer into two beings, a man who has all the rights of free men, and a lawyer, a being with limited rights.

Such attempted division is merely a legalistic tool or theory in defiance of the Constitution. And to confound logic further, the majority there based its decision on common law practices, practices which helped bring on the American Revolution. 366 U.S. n. 15 at p. 139; d., pp. 140, 142.

Fine distinctions have often been drawn between a right and a privilege. Many decisions, among them some relied on by the majority in *Hurley* have held that a lawyer practices his profession by sufferance. Up to this point this had been true. We now ask this most august tribunal to declare that once a person has

been qualified to practice law and has been made a member of the bar, such membership becomes a right, to be lost only by due process of law, and not by the whim or caprice of any bar group or court based on transient concepts of ethics or morality. See Justice Black's dissent in *Hurley*, 366 U.S. at p. 147.

The majority in *Hurley* said, at 366 U.S., page 125:

"Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicated, not upon any unfavorable inference which it drew from petitioner's assertion of the privilege . . . nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed the Court."

All that the majority here says, in *Hurley*, in redundant language, is that Cohen was penalized for pleading his constitutional rights. The dignity of the law was then vindicated by his destruction as a lawyer. The destruction was accomplished by weighing the importance of the Constitution against the theory that a lawyer is an "officer of the court". Being such "officer", he must be like Caesar's wife, above suspicion. Is this of sufficient importance under our Constitutional scheme of things to create constitutional exceptions? A hole in the dyke weakens the dyke.

That a Court or a bar group might be hindered in a witch-hunting purpose should be of no greater importance in the eyes of the law than efforts to con-

vict alleged traitors, communists, or felons. All attempts to enforce the law are of importance, some of greater and others of lesser degree. Never is the importance of attaining conviction great enough to justify the suspension of the basic liberties guaranteed by the Bill of Rights, as this Court has so clearly announced in all its recent constitutional decisions. Exceptions carry great danger to our constitutional system, for once the precedent is established the floodgates will be opened.

We, therefore, humbly submit that the Court weigh with greatest consideration, the words of Justice Black in his scholarly and documented dissent in *Hurley* (366 U.S., at page 138) :

"I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of

governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the view of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people."

"Nor do I believe, as the majority asserts, that the discrimination here practiced is justified by virtue of the fact that the courts of England have for centuries exercised disciplinary powers 'over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.' The rights of lawyers in this country are not, I hope, to be limited to the rights that English rulers chose to accord to their barristers hundreds of years ago. For it is certainly true that the courts of England could have then, as the majority points out, made 'short shrift' of any barrister who refused to 'cooperate' with the King's courts. Indeed, those courts did sometimes make 'short shrift' of lawyers whose greatest crime was to dare to



defend unpopular causes. And in much the same manner, these same courts were at this same time using their 'inherent' powers to make 'short shrift' of juries that returned the wrong verdict. History, I think, records that it was this willingness on the part of the courts of England to make 'short shrift' of unpopular and uncooperative groups that led, first, to the colonization of this country, later, to the war that won its independence, and finally to the Bill of Rights."

And, at 366 U.S., page 143, he continued:

"It is, of course possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the lawyer's independence. But I find no such promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of 'cooperation', even to the destruction of constitutional safeguards, and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. Could a lawyer who refused to 'cooperate' now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute 'shady practices'?"

## V. COHEN V. HURLEY CAN NO LONGER BE SUPPORTED ON CONSTITUTIONAL GROUNDS

In *Mallory v. Hogan*, 378 U.S. 1, 8, this Court held that "The Fourteenth Amendment secures against State invasion, the Fifth Amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for so doing, as held in *Twining*<sup>4</sup>, for such silence.

Peculiarly appropriate here is Justice Brennan's statement in *Malloy*, at page 8, relating to the overturning of the principle of *Wolf v. Colorado*, 388 U.S. 25, by *Mapp v. Ohio*, 367 U.S. 643:

"We relied upon the great case of *Boyd v. United States*, 116 U.S. 616, decided in 1886, which, considering the Fourth and Fifth Amendments as running 'almost into each other', id., at 630, held that 'Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [those Amendments] . . . ' (Italics added)

Having thus adverted to the purity of reasoning dictated by *Boyd*, the next step was inevitable. Re-

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<sup>4</sup>*Twining v. New Jersey*, 211 U.S. 78

viewing the extension of the guaranties of the First, Fourth and Sixth Amendments to the States<sup>5</sup>, Justice Brennan, in the majority opinion, at page 10, continues:

"The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights'. *Ohio ex rel Eaton v. Price*, 364 U.S. 263, 275 (dissenting opinion). If *Cohen v. Hurley*, 366 U.S. 117, and *Adamson v. California*, *supra* suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the Twining view of the privilege has been eroded. What is accorded is a privilege of refusing to incriminate one's self and the feared prosecution may be by either federal or state authorities". (Italics added).

This view reduces the problem to its lowest denominator. The appellant here, Spevack, is entitled to the *full* protection of the Constitution against the New York attack. Only by abandoning consistency can it now be held that Spevak, as an individual, cannot be punished in any manner for refusing to submit to un-

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<sup>5</sup>*Gitlow v. New York*

*Cantwell v. Connecticut*, 310 U.S. 296 (First Amendment)

*Louisiana ex rel Gremillion v. NAACP*, 366 U.S. 293, the prohibition of unreasonable search and seizure of the Fourth Amendment.

*Ker v. California*, 374 U.S. 23, and the right to counsel guaranteed by the Sixth Amendment.

*Gideon v. Wainwright*, 372 U.S. 335

reasonable searches and seizures and for refusing to testify against himself under the protection of the Constitution, but Spevack, the lawyer, may not avail himself of such protection.

Only a "watered-down, subjective version of the individual guarantees of the Bill of Rights" would result should the Court, having thus repudiated *Hurley*, avoid such repudiation by creating an exception, almost before the ink is dry on the decision. It would inevitably lay the groundwork for repudiation through additional exceptions.

This being the first true test of principle of *Malloy* it is urged that the Court stand fast to discourage further attack.

Any suggestion that an advocate be denied the equal protection of the Constitution should be rejected as a form of discrimination, amounting to a betrayal of the basic purposes of the Founders in creating a written constitution guaranteeing equal protection to all.

## VI. GENERAL ALLEGATIONS AMOUNT TO INDICTMENT WITHOUT EVIDENCE—A DENIAL OF THE RIGHT TO BE CONFRONTED BY WITNESSES

Here there are no specific allegations which should be alleged in an indictment, no specific time, place or charge. In a case of this type the lawyer is not only deprived of his rights under the Fourth and Fifth Amendments but by asserting his right to them, he



loses the benefit of the Sixth. In *Gideon v. Wainwright*, 372 U.S. 335, it was held that the Fourteenth Amendment makes the Sixth Amendment's guarantee of the right to counsel obligatory upon the States. *Pointer v. Texas*, 380 U.S. 400, 401 (1965). The *Pointer* case then went on to decide "that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."

Adherence to *Hurley* would render nugatory the progress achieved in *Malloy v. Hogan*, supra, *Gideon v. Wainwright*, supra, *Pointer v. Texas*, supra, because the result is that lawyers, as a class, would be deprived, not only of a fair trial, but of any trial at all, merely by the expedient of general allegations with no witnesses, no confrontation, and a resulting implied verdict of guilty if the lawyer fails to produce the evidence to prove his innocence. This is a return to trial by ordeal more appropriate to the Peoples' Courts of conquering dictators than under the Constitution of the United States.

## CONCLUSION

The great and vital concern of the organized trial lawyers of America in submitting this amicus curiae brief is that our judicial system remain free and independent, truly an arm of the court and officers of the court, to the end that:

1. No rumor, or slander, or baseless accusation be permitted to undermine that position;

2. That all charges be based upon documented fact;

3. That no carte blanche authority be given any board of inquiry to pry into private affairs without due process of law;

4. That the tyranny of the majority be restrained within constitutional bounds for the preservation of our freedom in a positive rather than a theoretical manner;

5. That their independence may be maintained in order that they may continue to function as the voice and protector of all causes, popular and unpopular, at all times, without fear of retribution.

Edward Alexander<sup>6</sup>, in comparing the doctrines of humanism and liberalism, in a warning against despotism, said:

"In his 1840 review of *Democracy in America*, Mill expounded Tocqueville's doctrine of the Tyranny of the Majority. This peculiarly American plan of tyranny, Mill said, was exercised less over the body than over the mind. In America, the land of freedom and of great intellectual activity on the part of the individual, less independence of thought existed

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<sup>6</sup>Edward Alexander, 1965, Columbia University Press, New York and Routledge and Kegan Paul, London, p. 228.

than in any other country. For when the collective voice of the majority in America had made up its mind about a question, hardly a single American dares to question its conclusion. Having rejected the authority of the past, of the philosopher, of the priest, Americans prostrated themselves before the God of public opinion. Each American found himself incapable of imagining that an enormous mass of individuals all very much like himself could be in the wrong. Mill feared that America, for want of a strong sense of resistance to popular will, would fall under the tyranny of the majority."

This Court, from its earliest days, has been that strong center of resistance to the tyranny of the majority, the tyranny of the transient popular will, as expressed by de Tocqueville. It has fully justified the judgment of its founders in placing its justices above the power of that transient popular will. In this case of transcending importance to the American people it is prayed that the Court will see its way clear to continue in that role, that it will strike down all efforts to make impotent the legal profession by placing it without the pale of constitutional protection.

The American Trial Lawyers Association prays:

1. That the judgment of the New York Court of Appeals be reversed.
2. That petitioner, Samuel Spevack, be reinstated as a member of the Bar of the State of New York.

3. That the doctrine of *Cohen v. Hurley* be repudiated.

American Trial Lawyers Association,  
Amicus Curiae

By ISRAEL STEINGOLD,  
*Counsel*  
Town Point Building  
Norfolk, Virginia

ISRAEL STEINGOLD  
*Of Counsel*  
Town Point Building  
111 W. Main Street  
Norfolk, Virginia



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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1966

No. 62

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SAMUEL SPEVACK,

*Petitioner,*

—v.—

SOLOMON A. KLEIN,

*Respondent.*

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**BRIEF OF THE ASSOCIATION OF THE BAR OF THE  
CITY OF NEW YORK AS *AMICUS CURIAE***

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JOHN G. BONOMI

*Attorney for the Association of the  
Bar of the City of New York as  
Amicus Curiae*

36 West 44th Street

New York, N. Y. 10036

212 MURRAY HILL 2-0606

MICHAEL FRANK

PETER J. O'CONNOR

*Of Counsel*

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Statement of Interest

The Association of the Bar of the City of New York has a membership of over 8,700 lawyers. It was incorporated by the New York State Legislature for the purpose, in part, of "maintaining the honor and dignity of the profession of the law" and "increasing its usefulness in promoting the due administration of justice". Since 1870 it has maintained a Committee on Grievances which has served as an agency of the Appellate Division, First Department, in maintaining high standards of ethics among the members of the Bar in its jurisdiction. *Matter of Branch*, 178 App. Div. 586 (1st Dept. 1917).

The determination of questions presented on this appeal will affect the procedure of this Association's Committee

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The determination of questions presented on this appeal will affect the procedures of this Association's Committee

on Grievances as well as those of the Co-ordinating Committee on Discipline\* in which this Association participates. It will also have consequences of great public concern. For these reasons, the Association has requested and obtained the consent of the parties to this appeal to file a brief *amicus curiae*. The Association supports the position of the Respondent.

### Opinions Below

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, ordering Petitioner's disbarment is reported as *Matter of Spevack* in 24 A. D. 2d 653 (2d Dept. 1965). Affirmance by the Court of Appeals of the State of New York may be found at 16 N. Y. 2d 1048 (1965), and the amended remittitur at 17 N. Y. 2d 490 (1966).

### Jurisdiction

This Court's jurisdiction rests on 28 U. S. C. §1257(3).

### Constitutional Provisions, Statutes and Appellate Division Rules Involved

#### *United States Constitution, Amendment V.*

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

\* The Co-ordinating Committee on Discipline was created in 1958 as a joint effort on the part of, and pursuant to a plan adopted by, the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department, the Association of the Bar of the City of New York, The New York County Lawyers' Association, and The Bronx County Bar Association, in order to survey and investigate the practices of attorneys and others engaged in the handling of claims for personal injuries in the First Judicial Department.



*United States Constitution, Amendment XIV*

"Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*New York Judiciary Law, Section 90, Subdivision 2*

"The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

*Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department.*

"Rule 3. *Statements as to retainers in actions or claims arising from personal injuries or property damage and in condemnation or change of grade proceedings—blank retainers.* Every attorney who, in connection with any action or claim for damages for personal injuries or for property damage or for death or loss of services resulting from personal injuries, or in connection with any claim in condemnation or change of

grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceedings, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury or damage or the title and description of the condemnation or change of grade proceeding, the date it was commenced and the number or other designation of the parcels affected.

"If the action or claim arises from personal injuries or property damage, it shall also be stated whether or not the client was personally known to the attorney prior to the date of injury or property damage, the name and address of any person or persons who referred the client to the attorney or who had any connection with referring the client to the attorney, stating the connection. This shall be stated if the attorney was retained or associated in any way in five or more claims made or actions instituted in the previous calendar year for personal injuries, property damage or both. (Par. added March 2, 1953.)

"Such statements may be filed personally by the attorney or his representative, or by registered mail.

Such statements may also be filed by ordinary mail, provided the statements are accompanied by a self-addressed stamped return postal card containing the date of the retainer and the name of the client. The postal card will be signed by the clerk of the court and mailed to the attorney, and it will serve as a receipt for the filing of the statement of retainer. (Par. am. Jan. 20, 1954.)

"No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney is left in blank at the time of its execution."

*Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Department.*

"Rule 5. *Preservation of records of actions, claims and proceedings.* In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought."

## Statement of the Case

### 1. *The Role of the Attorney as an Officer of the Court*

Historically, membership in the Bar has involved a unique duality. On the one hand, it furnishes the attorney with the purely private right to earn a living. On the other hand, it invests him with certain public responsibilities. As Dean Roscoe Pound stated in *Survey of the Legal Profession (The Lawyer from Antiquity to Modern Times)*, p. 5, a profession is "a group of men pursuing a learned art as a common calling in the spirit of public service,—no less a public service because it may incidentally be a means of livelihood." The attorney becomes "an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice"—*People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 470-71 (1928). This concept of the attorney is not an abstraction for, in a very real sense, the layman's access to justice under the law is dependent upon the availability of competent and trustworthy counsel.

The State, by licensing the individual as an attorney, affords him the opportunity of earning a living by conferring upon him the right to participate in a public area of activity—the administration of justice. Recognizing the substantial public interest involved, the State grants this right subject to the assumption of certain basic responsibilities. Thus, the attorney may be assigned as counsel to an indigent defendant in a criminal case without compensation; is subject to the proscriptions of the Canons of Professional Ethics; and, in fulfilling his responsibilities to the court which appointed him, must answer all inquiries con-



cerning his use of the rights it has conferred upon him by the license to practice.

## **2. *The Use of the Contingent Fee as a Method of Financing Legal Services***

Petitioner's disbarment arises in the context of a judicial investigation into the conduct of attorneys engaged in the practice of negligence law on a contingent fee basis. Therefore, it is necessary to consider the circumstances surrounding this speculative method of financing personal injury claims in order to understand the proceedings below.

The contingent fee has recently been the subject of a monumental study under the auspices of the American Bar Foundation. See MacKinnon, *Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities* (1964). The contingent fee may be defined as "a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the lawyer is not entitled to a fee" (MacKinnon at 3). Almost everywhere outside of the United States use of contingent fees is considered "contrary to the public interest, unprofessional, and even criminal" (*Id.* at 209). But in the United States it has come to be the established, if not the exclusive, method for financing personal injury claims, primarily because of the opportunity it offers those otherwise without funds to obtain legal representation and access to the processes of justice for the prosecution of their claims. Various types of contingent fees are also becoming increasingly frequent in other areas of legal practice (see generally *Id.* at 25-28).

The experience in the United States, and particularly New York, indicates that the contingent fee has been the subject of pervasive and continuing abuses. As early as 1908, after sixty years of experience with the contingent fee, the Committee on Contingent Fees of the New York State Bar Association reported that "what was intended as the poor man's fee has too often been seized as the lawyer's opportunity", 31 N. Y. S. B. A. Rep. 99, 100. Drawing primarily from the New York experience, MacKinnon (at 4-5) summarizes the difficulties which have arisen with the contingent fee and the criticisms which have been made of it as follows:

"The basic objection to the contingent fee is the adverse effect it possibly may have on the performance of the bar's professional responsibilities, both in the case at hand and, more importantly, in the future. The major arguments against contingent fees are that the gamble on the outcome introduces a speculative attitude toward law practice which is inconsistent with the detachment essential to a profession and that, because of the contingency, there is an emphasis on winning which tends to reduce the lawyer's self-restraint in negotiation and trial advocacy, thereby endangering the effective operation of the adversary system of judicial administration. In addition, the financial rewards to the lawyer are so large as to encourage competitive solicitation of potential clients, impairing the professional disinterest necessary to sound advice to his client and weakening the ties between fellow lawyers which form one of the essential characteristics of a profession. Further, the lawyer acquires an interest in the lawsuit that might come be-

tween him and his client, not only concerning the amount of the fee but also over the control of the suit on such questions as to whether to accept an offer of settlement. Finally, it is argued that giving the lawyer the right to finance litigation tends to motivate him to stir up lawsuits, both those that are supportable but would not be brought on the client's initiative and those that are groundless but have nuisance value, thus adding to the burdens of already overcrowded courts and contributing to an undesirable litigious attitude in the community."

Despite these disadvantages inherent in the contingent fee, New York has determined that its continuance is necessary to place the courts of justice within reach of the indigent citizen with a meritorious cause of action who is unable to pay a fixed fee for representation by competent counsel. At the same time, the State, through the Appellate Division of the Supreme Court which is charged with the responsibility of supervising the conduct of attorneys, has taken steps to prevent the evils attendant upon the contingent fee.

### **3. The Steps Taken by New York to Regulate the Use of the Contingent Fee**

The courts of New York have always had inherent power, irrespective of particular statutory authority, to supervise and regulate the legal profession, since lawyers are officers of the court, *In the Matter of H—*, 87 N. Y. 521, 524 (1882); *People ex rel. Karlin v. Culkin*, *supra*; accord *Ex parte Secombe*, 60 U. S. (19 How.) 9, 13 (1856). Proposals for reform, therefore, have generally been presented directly to the judges.

The first large-scale investigation of the contingent fee was undertaken by Justice Wasservogel of the New York Supreme Court in 1928. His report\* and a subsequent report\*\* in 1938 by Assistant District Attorney Bernard Botein (now Presiding Justice of the Appellate Division, First Department), disclosed a sordid picture of abuses against the unsophisticated and indigent client. Evidence unearthed during the inquiries revealed widespread ambulance chasing, champerty and maintenance, fee splitting, unauthorized and excessive charges, and outrageous overreaching. Justice Wasservogel recommended that "... all contingent retainers in actions for personal injuries should be placed under the supervision of the courts, in order adequately to protect claimants in their relations with attorneys, and to eradicate the abuses which have been practiced upon the courts by attorneys", 14 Mass. L. Q. at 6.

The next initiatives for reform resulted from a comment by the Appellate Division in an opinion rendered in *Buckley v. Surface Transportation Corp.*, 277 App. Div. 224, 226 (1st Dept. 1950). The Court criticized "what appears to be a growing practice of attorneys in personal injury actions requiring retainers of 50% from their clients irre-

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\* The full title is Wasservogel, *Report in the Matter of the Investigation Ordered by the Appellate Division of the Supreme Court in and for the First Judicial Department, by Order Dated February 7th, 1928, upon the Petition of the Association of the Bar of the City of New York, New York Lawyers Association and Bronx County Bar Association, for an Inquiry by the Court into Certain Abuses and Illegal and Improper Practices Alleged in the Petition* (Commonly referred to as *Ambulance Chasing*), 14 Mass. L. Q. 1 (November, 1928).

\*\* *Report of the Special Committee on the Desirability of Judicial Regulation of Contingent Fees*, in *Association of the Bar of the City of New York Yearbook* 293 (1938).



spective of the services involved". The Appellate Division thereafter promulgated a rule fixing limits upon the size of the fee which an attorney could claim under a contingent fee arrangement. The court's power to promulgate such a rule was ultimately upheld by the Court of Appeals in *Gair v. Peck*, 6 N. Y. 2d 97 (1959), *cert. denied*, 361 U. S. 374 (1960).

In order to assure compliance with the substantive provisions of its rules, the Appellate Division not only requires attorneys to file retainer statements in contingent fee cases but also to keep careful financial books and records of disbursements of their own funds and of the funds they maintain on behalf of their clients. This requirement was embodied in Rule 5 of the *Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department* promulgated by the Appellate Division of the New York Supreme Court, which provides that attorneys "preserve the pleadings, records, and other papers pertaining to [every] action, claim and proceeding, and also all data and memoranda of the disposition thereof, for a period of at least five years . . ."

The rules regulating contingent fee cases are, of course, not self-enforcing. Experience has demonstrated that reliance upon complaints of clients is totally impractical and ineffectual. Thus, the client, suffering from the injuries for which he seeks redress, impoverished by medical bills and unversed in the law, is rarely cognizant of his rights. As the Court of Appeals has noted in *Gair v. Peck*, *supra*, the duty and function of the Appellate Division to keep the house of the law in order does not, and cannot be permitted to, hinge upon whether clients in such circumstances have the stamina to assert their rights. Furthermore, it

is the rare client who will risk making a complaint, burdened with the knowledge that his attorney holds the purse strings to settlement.

To provide for effective enforcement of its rules, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, created, in 1957, pursuant to New York Judiciary Law §90 (2), the additional Special Term of the Supreme Court (Judicial Inquiry) for the purpose of investigating suspected illegal conduct and unethical practices and conduct prejudicial to the administration of justice among members of the Kings County Bar. In furtherance of its duties, the Judicial Inquiry was empowered to subpoena witnesses, to transcribe testimony under oath, and to examine the records required to be maintained by attorneys pursuant to the Appellate Division's Special Rules, *supra*.

#### **4. The Facts and Proceedings Below**

In the period from 1953 to 1957, Petitioner filed, as required by the rules of the Appellate Division, 735 statements of retainer in contingent fee cases. In 1958, the Judicial Inquiry sought to inquire into the circumstances surrounding the obtaining of such an unusually high number of retainers. On June 2, 1958, it served a subpoena *duces tecum* on Petitioner calling for production of certain books and financial records pertaining to his practice as an attorney in personal injury actions and required to be preserved by Rule 5 of the Special Rules. Petitioner's motion to quash the subpoena was litigated in a separate proceeding which resulted in a denial of his challenge to its validity, *Anonymous No. 14 v. Arkwright*, 7 A. D. 2d 874 (2d Dept. 1958), *motion for leave to appeal denied*, 5 N. Y.

2d 710 (1959), *cert. denied*, 359 U. S. 1009 (1959). Moreover, in affirming Petitioner's disbarment, the New York Court of Appeals held that the records specified in the subpoena were "records required by law to be kept by him", *Matter of Spevack*, 16 N. Y. 2d 1048, 1050 (1965).

Petitioner ultimately refused unconditionally to comply with any part of the subpoena. He declined "to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty . . ." (R. 117). Petitioner was disbarred for failing to comply with a condition of his license as an attorney that he preserve and produce, upon demand by the court, records relating to his contingent fee retainers. On this writ of certiorari, he attacks the imposition of discipline as unconstitutional under the self-incrimination clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment, *Malloy v. Hogan*, 378 U. S. 1 (1964), and the due process and equal protection clauses of the Fourteenth Amendment.

### Summary of Argument

1. The New York courts have consistently disciplined attorneys for failure to answer questions relevant to their professional conduct regardless of the reason asserted for such failure. It is clear that petitioner was disciplined for failure to answer such relevant inquiries and not for invoking the privilege against self-incrimination.

2. A condition of an attorney's license to practice is the requirement that he answer relevant inquiries concerning his professional conduct. Such requirement is necessary

to enable the State adequately to carry out its responsibility of supervising the Bar to assure clients that attorneys' licenses are ethical.

The role of the State in supervising contingent fee practices is particularly important to the poor and the uneducated who are the principal beneficiaries of this method of financing personal injury litigation. These are the very persons who are least likely to know their rights or have the capacity to protect their interests, *Miranda v. Arizona*, 384 U. S. 436 (1966). The privilege against self-incrimination does not insulate an individual from reasonable conditions imposed upon the continuance of his license.

3. Petitioner was required by the Special Rules of the Appellate Division to maintain the records which he refused to produce. Since they were required to be maintained by law, these documents do not fall within the protection of the privilege against self-incrimination, *Shapiro v. United States*, 335 U. S. 1 (1948).

4. The disciplining of an attorney for failure to answer inquiries relevant to his professional conduct does not violate the due process and equal protection guarantees of the Constitution. The requirement that such inquiries must be answered is a reasonable condition attendant upon special status.



## ARGUMENT

### I.

**Petitioner was subjected to discipline solely by reason of his failure to comply with the requirement that he answer inquiries relevant to his professional conduct upon which his license was contingent and not for invoking the privilege against self-incrimination.**

Petitioner concedes that the New York courts have consistently disciplined attorneys for failure to answer inquiries concerning their professional conduct regardless of the grounds therefor (Pet. Br. p. 35).<sup>\*</sup> The logical conclusion to be drawn from such uniformity is that Petitioner was disciplined for his failure to answer relevant inquiries rather than for his invocation of the privilege against self-incrimination. Thus, he was subjected to discipline in exactly the same manner as if he had simply not appeared or had refused to answer a relevant question without advancing any reason. No unusual or novel sanction resulted because the failure to answer was predicated upon the privilege against self-incrimination.

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<sup>\*</sup> Petitioner advances the theoretical argument that an attorney might be disciplined for invoking the attorney-client privilege. There is an important distinction between invoking the attorney-client privilege and invoking the privilege against self-incrimination. The former privilege is that of the client, *not* the attorney, and the attorney's failure to assert that privilege warrants discipline (Canon 37 of the Canons of Professional Ethics).

## II.

The shield of the privilege against self-incrimination may not be invoked as a sword to strike down reasonable requirements imposed by law attendant upon the continued maintenance of rights granted by the State.

Implicit in the very concept of licensing is recognition of a public interest in the occupations, activities and professions with respect to which it exists. Government, on behalf of the public, supervises those who are granted the right to earn a livelihood in areas of public interest.

The attorney is given the right, by virtue of his license, to earn a living on the basis of his access to the courts and other facilities publicly created and maintained for the administration of justice. The State, in conferring this right, attaches the condition that the attorney will answer whenever his use of that right is questioned in an authorized inquiry. This requirement is reasonable not only in theoretical terms but also in view of the history of the contingent fee and its abuses in New York State,\* as set forth, *supra*. Indeed, Petitioner concedes that he has a duty to be candid and cooperative with the Court (Pet. Br. p. 27).

The requirement of cooperation with any authorized inquiry pertaining to the rights granted under a license is not peculiar to attorneys. It may fairly be stated that it is a universal requirement attendant upon the issuance of

\* The English exercise even more supervision. They require that solicitors maintain complete books and records concerning their practice which must be audited annually [Solicitors Act, 1957 (5 & 6 Eliz. 2 C. 27), §30].

any license. In fact, many rights created by license are subject to periodic renewal conditioned upon the submission of certain information bearing upon past and future use of the license, i.e., permits to carry concealed weapons or to operate an automobile.

It is axiomatic that the entire system of licensing depends, in large measure, upon information obtained by inquiries directed to the licensee. Petitioner contends that where the failure of the licensee to respond is predicated upon the privilege against self-incrimination, the requirements of the State are nullified, and the State is compelled to continue the license in full force despite such failure. Such a conversion of the privilege against self-incrimination from a shield into a sword is not only unwarranted by the scope of the privilege as developed in decisions of this Court, but would effectively destroy the administrative process.

While *Malloy v. Hogan, supra*, held that the Fifth Amendment is applicable to state proceedings, it is not determinative of the scope of the privilege against self-incrimination. Expansion of the privilege as urged by Petitioner would require the Appellate Division, in the instant case, to continue to certify him as an attorney in good standing despite his refusal to comply with the requirement that he produce records concerning his conduct as an attorney. A logical extension of Petitioner's contention would also require the State to continue a license to carry a concealed weapon when the owner refuses to answer on the ground of self-incrimination such actual requests for information as (1) "State reasons for license" or (2) "Since the issuance of your current pistol license have you used narcotics, barbiturates or suffered from any mental

disorders".\* Similarly, the State would be required to continue a driver's license when the driver refuses to answer on the ground of self-incrimination the question, "Have you ever had a learner's permit or a license to operate a motor vehicle refused, suspended or revoked, cancelled or an application for a Driver License denied, in this State or elsewhere?"\*\* In fact, all positions of trust to which an individual might be appointed by the State would be similarly affected. Thus, for example, if Petitioner's contention is followed, a trustee of funds who refused to account on the ground of self-incrimination could not be removed by the court which appointed him.

Petitioner's contention that reasonable requirements imposed by law upon a licensee may not be enforced where refusal to comply is predicated upon constitutional grounds has even more far-reaching implications since such a doctrine could not logically be limited to the privilege against self-incrimination. For instance, substantial portions of the Canons of Ethics might conceivably be struck down on the ground that they restrict the attorney's freedom of speech guaranteed by the First Amendment (see Canons 1, 7, 9, 20, 27 and 37 adopted by the American Bar Association).

Petitioner, therefore, finds himself compelled to argue (Pet. Br. p. 37) that requiring the State to continue to certify him as an attorney, despite his failure to reply to relevant inquiry, would not substantially impede the State's conceded interest in maintaining desired standards of con-

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\* Form L. D. 39B (Rev. 10/58), Division of Licenses, Police Department, City of New York.

\*\* Form MV-43 (9/64), New York State Department of Motor Vehicles.



duct by its attorneys. Petitioner contends that the State could with little difficulty examine the Statements of Retainer which he has filed pursuant to the rules of the court and could ascertain therefrom sufficient information\* to conduct an independent investigation case by case. This would require a search through court records, insurance company files, and other sources, to determine whether any evidence of misconduct exists. The practical difficulties of such a procedure are evident when an attorney, such as Petitioner here, has filed over 700 Statements of Retainer within a period of five years. Moreover, adoption of Petitioner's view of the scope of the privilege against self-incrimination would undermine the very procedure he himself suggests. Thus, if the privilege against self-incrimination is applicable to the records here in question, it would be equally applicable to the requirement that Statements of Retainer be filed. This result necessarily follows since the answers required in the Statement of Retainer could lead the State, as Petitioner suggests, to the very information contained in his records which he contends would incriminate him.

In arguing that the State could rely on independent investigation, Petitioner raises grave due process questions. Such procedures would require that investigations of attorneys, presently made confidential by statute, would become generally known among the attorney's clients, carriers, doctors, *et al.* Such a general inquiry could destroy the attorney's professional reputation to an extent that subsequent exoneration, if warranted, could not repair—

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\* The information provided therein included the name of the client, the name of the prospective defendant, the person or persons who referred the client and the terms of the agreement for compensation.

"Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored", Cardozo, Ch. J. in *People ex rel. Karlin v. Culkin, supra*, at 478. Further, the institution of such a sweeping investigation as a result of the attorney's invocation of his privilege might, under Petitioner's thesis, also constitute a penalty for its invocation and hence would be barred. If so, the scope of the privilege would be so far expanded as to insulate from investigation an attorney who invokes it.

Such an expansion of the scope of the privilege against self-incrimination, resulting in the virtual elimination of effective licensing procedures, finds no support in any prior decisions by this Court. The opinions cited by Petitioner generally concern procedures in *criminal* cases which violate the privilege [(*Bram v. United States*, 168 U. S. 532 (1897) (coerced confession); *Gouled v. United States*, 255 U. S. 298 (1921) (illegally seized evidence); *Wan v. United States*, 266 U. S. 1 (1924) (coerced confession); *Smith v. United States*, 337 U. S. 137 (1949) (introduction of prior testimony obtained under circumstances which conferred immunity by operation of law); *Griffin v. California*, 380 U. S. 609 (1965) (prosecutor's comment on defendant's failure to testify at criminal trial)] and the circumstances under which the privilege may be invoked [(*Boyd v. United States*, 116 U. S. 616 (1886) (claimant in federal seizure and forfeiture proceeding may invoke privilege); *Counselman v. Hitchcock*, 142 U. S. 547 (1892) (grand jury witness may invoke privilege); *Brown v. Walker*, 161 U. S. 591 (1896) (a grand jury witness afforded complete immunity from prosecution may not invoke privilege); *McCarthy v. Arndstein*, 262 U. S. 355 (1923) (witness in bankruptcy proceeding may invoke privilege); *United States v. White*,

322 U. S. 694 (1944) (union officer may not invoke privilege to prevent production of his union's records pursuant to grand jury subpoena); *Hoffman v. United States*, 341 U. S. 479 (1951) (grand jury witness may invoke privilege where answers to inquiry might furnish link in chain of evidence needed to prosecute him for crime); *Quinn v. United States*, 349 U. S. 155 (1956) (witness before legislative committee may invoke privilege); *Ullman v. United States*, 350 U. S. 422 (1956) (a grand jury witness afforded complete immunity from prosecution may not invoke privilege); *Malloy v. Hogan*, 378 U. S. 1 (1964) (witness in state criminal investigation may invoke privilege)].

This Court's determination in *Slochower v. The Board of Education*, 350 U. S. 551 (1956), relied upon by Petitioner (Pet. Br. p. 26), is not dispositive of the issues. Unlike *Slochower*, we are not dealing here with a statute or state procedure which "operates to discharge every city employee who invokes the fifth amendment." Thus, the mere invocation by an attorney of the privilege against self-incrimination outside the context of an inquiry into his professional conduct, as for example before a grand jury, would not in and of itself warrant discipline, *Matter of Solovei*, 276 N. Y. 647 (1938) affirming 250 App. Div. 117 (2d Dept. 1937). The instant matter involves relevant inquiries directed at Petitioner by the agency which granted his license and supervises his professional conduct. In *Slochower*, the Court recognized that under such factual circumstances a different result might be warranted. Thus, the Court there stated (at page 558):

"It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was an-

nounced as not directed at the property, affairs, or government of the city . . . ”.

The indigent and uneducated are most likely to become involved in the processes of the law in the personal injury and criminal fields. It is, therefore, of particular importance that counsel in these fields be ethical, for, as this Court recognized in *Miranda v. Arizona*, 384 U. S. 426 (1966), the poor and the ignorant are least likely to know their rights or have the capacity to protect their interests. The client in personal injury cases, unversed in the law, has no frame of reference by which to evaluate the conduct of counsel. Moreover, if he should discover unethical behavior by his attorney during the course of the litigation, his rights may have been unalterably damaged. Thus, the client must rely primarily upon the State to vouch for the integrity and ethical conduct of his attorney. That is precisely what the State is attempting to do in this matter, where its efforts are directed to maintaining the ethical standards and integrity of the Bar. In *Miranda*, the State played quite a different role by countenancing practices which effectively deprived the indigent and uneducated of the right to counsel.

Proper representation by counsel fully and solely devoted to the client's interests is fundamental to the administration of justice. This concept underlies the Court's opinion in *Miranda* and, as we have shown, the scope of the privilege against self-incrimination in no sense requires that this principle be eroded so soon after its pronouncement.



### III.

**The documents which Petitioner refused to produce were, in any event, not subject to the privilege against self-incrimination.**

The records which Petitioner refused to produce concerned transactions which were subject to the supervisory power of the Appellate Division. Furthermore, they were documents which the Special Rules of the Appellate Division required him to maintain. Under *Shapiro v. United States*, 335 U. S. 1 (1948), such documents constitute "required records" and are outside the scope of the privilege against self-incrimination. In *Shapiro*, the Court, in quoting from its prior opinion in *Davis v. United States*, 328 U. S. 582, 589-90 (1946), stated (335 U. S. 1, at 17):

"the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of the character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

We have already shown that a reasonable basis exists for requiring that such records be maintained by attorneys. This is necessary to permit the State to exercise its legitimate responsibility to supervise the conduct of attorneys which it licenses. In the circumstances, it is respectfully submitted that under the doctrine of *Shapiro* the records in question are not subject to the privilege and, consequently, no constitutional right is violated by the imposition of discipline for refusal to produce them.

Petitioner's reliance upon this Court's decision in *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1965), to support his contention that the *Shapiro* doctrine is no longer valid is misplaced. In that case, the Subversive Activities Control Board ordered Albertson to register as a member of the Communist Party. This act of registration alone, the Court concluded, could be used to prosecute and convict him under the membership clause of the Smith Act. Thus, the Board was specifically requiring Albertson to perform an act which in and of itself would incriminate him. Unlike *Albertson*, Petitioner was not compelled to perform an act which in and of itself would incriminate him. He merely was required, under the Special Rules of the Appellate Division, to maintain certain books and records relating to his personal injury cases.

In his efforts to extricate himself from the *Shapiro* doctrine, Petitioner states (Pet. Br. p. 54):

"Subject to the requirements of other constitutional provisions, the government could still require the keeping of records, and such records could be withheld from production only by natural persons who chose to claim the privilege and as to whom the government

was unwilling to grant immunity. There would be no effect upon the principal subjects of regulatory programs, since corporations and unincorporated associations such as labor unions and partnerships are not entitled to claim the privilege."

Petitioner thereby summarily dismisses the importance of supervising the official conduct of all "natural persons" in public and quasi-public positions of trust. Thus, *while retaining his position of trust*, the attorney could refuse to account to his client; the justice of the peace could refuse to report fines he has collected; and the druggist could refuse to report his sales of narcotic drugs; and, in each case, the individual is, as a practical matter, the exclusive repository of the information surrounding the transaction.

#### IV.

**Petitioner's disbarment did not violate either the due process or equal protection clauses of the Fourteenth Amendment.**

Under Point II, *supra*, we have pointed out that the requirement that attorneys answer relevant inquiries protects each citizen from improper legal representation. The necessity for this requirement is underscored by the client's ignorance of his rights; his reluctance to jeopardize the relationship with his attorney by filing a complaint; and the intricacies of legal practice which make it difficult for a layman to evaluate his attorney's conduct.

In these circumstances, it is respectfully submitted that the State's requirement that attorneys answer relevant inquiries is a rational and valid exercise of the State's power



within the meaning of the due process clause, see *Liggitt Co. v. Baldrige*, 278 U. S. 105, 111-112 (1928).

Under Point I, *supra*, we have shown that it is the attorney's failure to answer relevant inquiries, rather than his invocation of the privilege, which results in discipline. We have further pointed out that, in granting a license to an attorney the State affords him the opportunity to earn a private living in a public sector of the community—the administration of justice. The attorney's license is conditioned upon a requirement that he answer all relevant inquiries. If he does not, the condition is violated and the license terminated. The attorney is thereby subjected to no more or less than a reasonable condition attendant upon special status. This we submit is in no sense a deprivation of equal protection of the law.

If the standards required of an attorney were limited to those applicable to ordinary citizens, the Canons of Ethics would be nullified. The standards of the market place, however, have never fixed the limits by which the propriety of an attorney's conduct is measured.



**CONCLUSION**

**The judgment below should be affirmed.**

**Respectfully submitted,**

**JOHN G. BONOMI**

*Attorney for The Association  
of the Bar of the City of  
New York as Amicus Curiae*

**MICHAEL FRANK**

**PETER J. O'CONNOR**

*Of Counsel*

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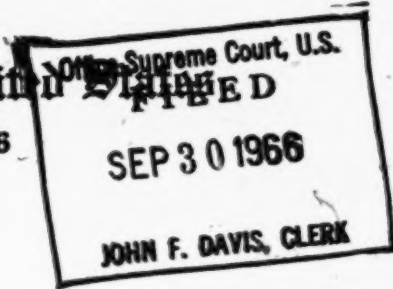
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1966

No. 62



**SAMUEL SPEVACK,**

*Petitioner,*

—v.—

**SOLOMON A. KLEIN,**

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

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**RESPONDENT'S BRIEF**

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**SOLOMON A. KLEIN**  
16 Court Street  
Brooklyn, New York 11201  
*Respondent, Attorney Pro Se*

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**Opinions Below**

The opinion of the Appellate Division of the Supreme Court of New York is reported at 24 App. Div. 2d 653. The memorandum opinion of the Court of Appeals, affirming the order of the Appellate Division, is reported at 16 N.Y. 2d 1048, 213 N.E. 2d 457. The order of the Court of Appeals amending its remittitur is reported at 17 N.Y. 2d 490, 214 N.E. 2d 373.

**Jurisdiction**

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. 1257 (3).

### **Question Presented**

Whether an attorney—who engages in contingent fee personal injury practice under court rules requiring him to keep a special account of funds recovered on behalf of injured clients and to preserve all records and memoranda of the disposition thereof—has a Fifth Amendment right to refuse to produce any of the required records when duly subpoenaed by the court charged with the duty of supervising his professional conduct, and to interpose a blanket refusal to answer any question which might be asked relating thereto.

### **Statutes Involved**

The pertinent constitutional and statutory provisions are set forth in the Appendix to this brief. They are: (1) the Fifth and Fourteenth Amendments to the United States Constitution, (2) section 90, subd. 2, of the New York Judiciary Law, and (3) the Rules of the New York Appellate Division regulating the conduct of attorneys who engage in personal injury practice on a contingent fee basis.

### **Statement of the Case**

#### **1.**

The New York Appellate Division of the Supreme Court is charged by statute with the duty to supervise the professional conduct of attorneys and to censure, suspend or remove from office any attorney whose conduct is prejudicial to the administration of justice. N. Y. Judiciary Law, §90 (2). Pursuant thereto, the Court has for many years



promulgated Special Rules Regulating the Conduct of Attorneys who acquire financial interests in personal injury and property damage cases upon a contingent fee basis.<sup>1</sup>

The Rules were promulgated to meet a two-fold need. First, to maintain the contingent fee privilege for the benefit of accident victims with meritorious claims but financially unable to pay a fixed fee for representation by competent counsel; and secondly, to prevent commercialization of the legal profession by those who abuse the contingent fee privilege under the false conception that it is a license to trade in negligence cases in which the administration of justice and the interest of the client may be exploited for the financial benefit of the attorney. See *Gair v. Peck*, 6 N.Y. 2d 97, cert. denied 361 U.S. 374; MacKinnon, *Contingent Fees for Legal Services, A Study of Professional Economics and Responsibilities* (1964), published under the auspices of the American Bar Foundation; *Retainer and Closing Statements*, Seventh Annual Report of the Judicial Conference of the State of New York (1962) pp. 144-147.

To meet this two-fold need the Special Rules provide that every attorney who acquires a contingent fee interest in a claim for personal injuries, property damage or wrongful death must;

(1) File a retainer statement with the Appellate Division setting forth the terms of his contingent fee agreement.

<sup>1</sup> See Special Rules, effective January 1, 1940, Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department. Clevenger's Practice Manual, pp. 21-19 (1959), printed as an Appendix hereto. Effective July 1, 1960, the Rules were renumbered and amended to conform with those of the First Judicial Department. Civil Practice Annual (1965) pp. 9-23 to 9-26.

and, if he had five or more such retainers in the preceding year, state the source of the retainer (Rule 3);

(2) Deposit "forthwith" the funds he collects either by way of settlement or after trial "in a bank or trust company in a special account" and refrain from commingling the same with his own funds (Rule 4);

(3) Deliver to the client "a statement in writing setting forth the amount received . . . and the amount which he claims to be due for his services and disbursements, specifying the same separately" (Rule 4);

(4) Remit to the client the amount due the client before withdrawing from the special account his share for services and disbursements (Rule 4);

(5) Preserve "the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years" after settlement or other termination of the case (Rule 5).

Breach of any of these Rules is declared to be professional misconduct within the meaning of the Judiciary Law (Rule 2).

## 2.

It was under the foregoing obligations that petitioner engaged in an extensive practice in personal injury claims on a contingent fee basis. In the seven and a half years that he filed retainer statements with the Appellate Divi-

sion he obtained 1,062 personal injury cases, an average of over 140 cases a year (R. 12-13, Exh. 1).<sup>2</sup>

No charges were made against petitioner (R. 41). But this extraordinary flow of contingent fee retainers into the office of a single practitioner prompted the court to call upon him, by subpoena *duces tecum* dated June 2, 1958, to produce specified records "pertaining to [his] business as an attorney" (R. 1). The subpoena directed him to produce the records at an Additional Special Term of the Supreme Court (Judicial Inquiry) established by the Appellate Division, Second Judicial Department, to inquire into "the evil practices [involved in the improper solicitation and handling of contingent-retainers in personal injury cases] with a view to enabling the court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them". *Cohen v. Hurley*, 366 U.S. 117, 119.

Petitioner challenged the validity of the subpoena in a separate proceeding to quash. The State courts overruled his objections, and on June 1, 1959, this Court denied a petition for certiorari. *Anonymous No. 14 v. Arkwright*, 7 A.D. 2d 874, leave to appeal denied 5 N.Y. 2d 710, cert. denied 359 U.S. 1009.

<sup>2</sup> The yearly rate of his retainers was as follows:

1953 .....	119
1954 .....	150
1955 .....	154
1956 .....	157
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<b>Total .....</b>	<b>1,062 (R. 12-13, Exh. 1)</b>

Thereafter several hearings were held at which petitioner was represented by counsel who actively participated in the proceedings (R. 19-51). The Inquiry's efforts to have petitioner produce the records in his possession were of no avail. Ultimately, on January 10, 1962, petitioner flatly refused under claim of Fifth Amendment privilege against self-incrimination to produce any one of the required records, and interposed a blanket refusal "to answer any questions in relation thereto" (R. 43).

These refusals constitute the dominant and controlling fact in the entire case. Beginning with petitioner's first appearance on June 12, 1958 and ending with his appearance in January 1962, the pivotal controversy was whether he would produce the records that he was required by the Special Rules to keep as a contingent fee practitioner in personal injury cases. The New York Court of Appeals, highest court of the State, in affirming the order of disbarment expressly held that petitioner had no Fifth Amendment privilege to refuse to produce the required records encompassed by the subpoena *duces tecum*, stating (16 N.Y. 2d 1048, 1050; R. 86, 88):

"... the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U.S. 582; *Shapiro v. United States*, 335 U.S. 1)."

And in its amended remittitur the Court of Appeals specified that it had overruled petitioner's contention that under the Fifth and Fourteenth Amendments he could not be disbarred for refusing to produce "any of the records" or "to answer any questions which might be asked relating thereto" (R. 90-91).



It will aid this Court to make an accurate determination of the questions presented to consider the following chronological statement of the facts.

At his first appearance in response to the subpoena, petitioner asked the court for more time to assemble his records and to decide whether to retain counsel (R. 14-17). He assured the court that he never commingled funds received on behalf of clients with his personal funds, that such trust funds were deposited in a special bank account (R. 16), and that the records he was required to keep in this respect were in his check books (R. 17):

"The Court: Where are those records that you are required to keep under Rule 4?

Mr. Spevack: Sir?

The Court: Where are the records you are required to keep under Rule 4, which is the rule requiring you to have set up a special account?

Mr. Spevack: They are in my check book."

To enable petitioner to gather his records and consult counsel the court granted an adjournment (R. 17-19), and on the adjourned date granted a further extension at the request of petitioner's counsel (David Berman), who was expressly told that "the only concern" was as to petitioner's position "relative to the records" (R. 20).

Thereafter petitioner, as above noted, instituted a separate proceeding to quash the subpoena, which ultimately resulted in this Court's denial of petitioner's application for a writ of certiorari. *Anonymous No. 14 v. Arkwright, supra*. Following such denial, petitioner and his counsel

were again told that all that was wanted by the Inquiry was that petitioner produce the subpoenaed records (R. 24-25; Tr. 42-45).<sup>3</sup>

At the next hearing on June 15, 1959, when another adjournment was requested:

"Mr. Caputo [for the Inquiry]: Just to state our position your Honor . . . the subpoena has been sustained in its entirety and we would like for him to produce the documents. There is nothing that has to be done in court here.

The Court: Isn't it that simple? I am going to grant you an adjournment. . . . Aren't we entitled to the documents?

Mr. Berman: May I most respectfully indicate to your Honor that in my humble opinion the Court is not entitled to it . . ." (R. 24).

On the adjourned date, June 26, 1959, petitioner took the witness stand and on the advice of his counsel refused to produce the records upon the ground that "the production might tend to incriminate or degrade me or to subject me to some penalty or forfeiture" (R. 29). Petitioner further stated that he could produce available records but that he claimed privilege to refuse:

"The Court: You had better state it again. The subpoena calls for the production of the books. They have not been produced.

The Witness: Whatever records, your Honor, that were available to me, I could physically, if I had obtained the time, get them together in a package and in a bundle and bring them here alongside of me. . . . Therefore, if I may say, the matter of produc-

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<sup>3</sup> References designated as "Tr." are to the typewritten transcript of the proceedings.

tion of the books, or of having them here physically is not in issue.

The Court: All right, leave that out now.

Mr. Berman: Thank you.

The Witness: That the only matter in issue is the refusal to turn them over" (R. 31-32).

Not a single question was asked of petitioner either as to the contents of the records he refused to produce or as to his conduct in the acquisition or processing of his contingent fee cases. The court did inquire "whether, assuming they (the records) were here, and assuming reference was made to them by counsel, and questions asked with respect to them, whether the witness's answer would be a refusal upon the basis that his answer might tend to incriminate him." In response thereto petitioner and his counsel stated that their position would be "definitely so" (R. 32).

Since, as stated by the court, this raised "a very serious question" that was to be determined in a case involving another lawyer (R. 30), the court suspended the hearing pending determination of the other case (R. 33-34). The case referred to was decided by this Court in April 1961. *Cohen v. Hurley*, 366 U.S. 117; rehearing denied in 1963, 374 U.S. 857, and again in 1964, 379 U.S. 870.<sup>4</sup>

<sup>4</sup> It is here appropriate to note that the controversy upon which this Court divided five to four in the *Cohen* case was not with respect to Cohen's refusal to produce records, but rather his refusal "to answer some sixty other questions" that he claimed would incriminate him. See Mr. Justice Harlan's opinion 366 U.S. at 120, and Mr. Justice Black's dissenting opinion at 133, note 3, where it is stated: " . . . And the record shows throughout that the whole controversy has hinged around the question of the power of the State, under both the State and the Federal Constitutions, to force him to answer the questions he had been asked at the inquiry. Under these circum-

After the *Cohen* decision petitioner wrote a letter, dated June 29, 1961, requesting permission to appear "in connection with the Appellate Division's Inquiry" (Tr. 145-146, Exh. 3). And then on July 6, 1961, his counsel forwarded to the Presiding Justice another letter signed by petitioner in which he said:

"In view of the recent decision by the Supreme Court in the *Cohen* matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before your Honor, during the course of the Judicial Inquiry, which I then asserted in good faith, upon the advice of counsel, and in the sincere belief that I then had the right to do so.

I am willing to testify and answer questions concerning relevant matters" (R. 52, Exh. 4).

Pursuant thereto, petitioner's counsel appeared at the Inquiry on September 5, 1961 (R. 34). He stated that there would be no objection "per se" to delivering the financial records for inspection by the Inquiry, but that some of the items did not exist and that "at the right time we could explain what is available." The court replied:

"All we want are the records which he keeps" (R. 35).

This request was repeated one month later when counsel requested a further adjournment:

"The Court: For the present we are concerned with the production of the records on the adjourned date. They will be produced!

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stances, I cannot allow to pass unnoticed the violation which I think has occurred with respect to petitioner's rights under the Fifth Amendment."



Mr. Berman: At that point that which can be produced will be produced" (R. 38).

Thereafter petitioner discharged Mr. Berman and retained new counsel (R. 38-39). His new counsel, Bernard Shatzkin, appeared at the Inquiry on October 23, 1961, at which time he, too, was told that the "only" thing wanted was that petitioner "produce the records in compliance with the subpoena" (Tr. 96). And before granting an adjournment:

"The Court: How about the production of the records counsel?

Mr. Shatzkin: If your Honor pleases, we intend to produce the records called for by the subpoena. We had made all those arrangements on Friday. We intended producing them here this morning" (R. 39-40).

And finally, after a further adjournment to January 10, 1962 (R. 40), petitioner appeared with his counsel, but not with the records. Instead, he sought more delay. This time the court denied the request and directed that the records be produced (R. 40-41).

Thereupon counsel revealed that he had advised petitioner that "in the event" a further adjournment were denied, he should "assert all of his constitutional privileges" (R. 41). And when petitioner was called to the witness stand he stated:

"I have conferred with my counsel, Mr. Shatzkin, at length, and he has advised me, after examining the law, and relying upon his advice to me as a lawyer ... [I am] obliged not to produce any of the records or to answer any questions in relation thereto ... " (R. 43).

The grounds he asserted encompassed the State and Federal privilege against self-incrimination, the right to due process of law and to equal protection of the laws (R. 43). He interposed these claims as to each record called for by the subpoena *duces tecum* (R. 43-44).

Petitioner was then informed that disciplinary proceedings would be instituted against him (R. 45).

In affirming the order of disbarment the New York Court of Appeals wrote a memorandum opinion in which it held (16 N Y 2d 1048, 1050):

"Order affirmed on the authority of *Cohen v. Hurley* (366 U.S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U.S. 582; *Shapiro v. United States*, 335 U.S. 1)."

Thereafter the Court amended its remittitur which reads as follows (R. 90-91):

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that his disbarment, based upon his refusal to produce any of the records specified in the subpoena *duces tecum*, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights."

## A R G U M E N T

**Petitioner's refusal to produce any records he was required by the Special Rules to keep as an attorney engaged in contingent fee personal injury practice is not encompassed by the Fifth Amendment privilege against compulsory self-incrimination.**

A valid claim of Fifth Amendment privilege against compulsory self-incrimination is protected through the Fourteenth Amendment from infringement by the States. *Malloy v. Hogan*, 378 U.S. 1. The New York Court of Appeals was not unaware of its obligation under the *Malloy* decision. Indeed, it applied the same standards as prevail in the federal courts. For as stated in *Malloy* at p. 11:

"It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court."

Thus the Court of Appeals held on the authority of this Court's decisions in *Shapiro v. United States*, 335 U.S. 1 and *Davis v. United States*, 328 U.S. 582, that petitioner, who was subject to the Special Rules regulating contingent fee practice, had no Fifth Amendment privilege to refuse to produce the "records required by law to be kept by him." *Matter of Spevack*, 16 N.Y. 2d 1048, 1050. This basis for affirming the order of disbarment was incorporated in the Court's order of affirmance, which remitted the case to the Appellate Division "there to be proceeded upon according to law" (R. 87-88). And on the remittitur the Appellate Division made the order of affirmance the order of that Court (R. 89-90).

In the *Shapiro* case, *supra*, this Court held that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established'."

This constitutional principle is not, as petitioner contends, an unwarranted or novel conception of the legitimate limits of the Fifth Amendment privilege against compulsory self-incrimination. As shown by the cases cited in the *Shapiro* opinion, the roots of this principle reach as far back as *Boyd v. United States*, 116 U.S. 616, where Mr. Justice Bradley carefully distinguished between purely private records and "books required by law to be kept" which were held to be "necessarily excepted out of the category of unreasonable searches and seizures."

The other cases cited in the *Shapiro* opinion further show that this Court has repeatedly approved and applied the required records doctrine as a constitutionally valid limitation of the Fifth Amendment privilege against compulsory self-incrimination. Its application to the facts in the instant case is, we submit, beyond reasonable dispute. The records of his special bank account, his check books, check stubs and other financial data pertaining to his contingent fee business are clearly within the valid requirements of Special Rules 4 and 5. Petitioner refused to produce any one of them. Since he has no privilege to repudiate the duties he voluntarily assumed by engaging in an extensive personal injury practice on a contingent fee basis, the Court has the right to revoke its certification of



petitioner to the public as an attorney who will account for the performance of his professional obligations.

As demonstrated in our Statement of the Case, petitioner's refusal to produce the required records as to which he has no valid privilege is the dominant and controlling fact throughout the proceedings at the Judicial Inquiry. His disbarment therefore rests on a wholly adequate State ground, requiring an affirmance of the judgment of the Court of Appeals. *Lanea v. New York*, 370 U.S. 139.

Little need be said with respect to petitioner's other arguments. The facts heretofore set forth demonstrate that no demand was made for oral testimony that might tend to incriminate him. As stated in the Court of Appeals' amended remittitur, petitioner had refused "to answer any questions *which might be asked relating*" to the records (R. 90-91). In the circumstances of this case he had no such constitutional right.

Finally, the contention that he was entrapped to believe that he had a Fifth Amendment privilege to refuse to produce the records is utterly absurd. Here, again, the facts above set forth show that his contention is a convenient afterthought.

**CONCLUSION**

**For the foregoing reasons and on the facts related the judgment of the Court of Appeals of the State of New York should be affirmed.**

**Respectfully submitted,**

**SOLOMON A. KLEIN**

***Respondent, Attorney Pro Se***

## **APPENDIX**

### ***United States Constitution, Amendment V***

**No person . . . shall be compelled in any criminal case to be a witness against himself.**

### ***United States Constitution, Amendment XIV***

**Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .**

### ***Section 90 of New York Judiciary Law***

**1. . . .**

**2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . . or any conduct prejudicial to the administration of justice. . . .**

### ***Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department***

**Rule 2. Penalty.** An attorney who violates any of these special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision two of section 90 of the Judiciary Law.

**Rule 3. Statements as to retainers in actions or claims arising from personal injuries. . . .** Every attorney who, in connection with any action or claim for damages for personal injuries . . . accepts a retainer or enters into an agreement, express or implied, for compensation for serv-

*Appendix*

ices rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury. . . .

*Rule 4. Deposit of collections-notice.* Where an attorney who has accepted a retainer or entered into an agreement as referred to in the preceding rule, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a bank or trust company in a special account, separate from his own personal account and shall not commingle the same with his own funds. Within ten days after the receipt of any such sum he shall cause to be delivered personally to such client or sent by registered mail, addressed to such client at the client's last known address, a statement in writing setting forth the amount received, the date when and the name of the person from whom he received the same, and the amount which he claims to be due for his services and disbursements, specifying the same separately. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw



*Appendix*

for himself the amount so claimed to be due him for compensation and disbursements. . . .

*Rule 5. Preservation of records of actions, claims and proceedings.* In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought.

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REPLY BRIEF FOR PETITIONER

LAWRENCE J. LATTO,  
WILLIAM H. DEMPSEY, JR.,  
MARTIN J. FLYNN

734 Fifteenth Street, N. W.,  
Washington, D. C. 20005,  
*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATZKIN,  
235 East 42nd Street,  
New York, New York.

SHERA & GARDNER,  
734 Fifteenth Street, N. W.,  
Washington, D. C. 20005.

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 62

SAMUEL SPEVACK, *Petitioner*,

v.

SOLOMON A. KLEIN, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE  
OF NEW YORK

REPLY BRIEF FOR PETITIONER

The brief of an *amicus curiae*, the Association of the Bar of the City of New York, correctly states that our initial discussion of the reach of the Fifth Amendment does not consider the logical extensions of our position. We did not undertake such a discussion primarily because the invalidity of the state's action in this case seemed clear under the well settled construction of the Fifth Amendment. However, *amicus curiae*'s contention that reversal of the judgment below would establish a principle that, carried to its logical extreme, would gravely impair the operations of the government is incorrect. To demon-



strate this, it is necessary to sketch a rather fully developed theory of the Fifth Amendment in many of its ramifications—ramifications which are not presented by this case.

In our opening brief we argued first that disbarment should be regarded as incrimination within the meaning of the Fifth Amendment's prohibitions, or, more precisely, that disbarment is a sanction indistinguishable from those traditionally imposed in criminal proceedings. See Comment, *The Fifth Amendment and Quasi-Criminal Sanctions*, 35 Tulane L. Rev. 400 (1961). If we are correct in that contention then clearly the state may not impose upon an attorney an election between disbarment and relinquishment of his constitutional privilege, since that action would amount to an adjudication of criminal guilt solely upon the basis of invocation of the privilege. Second, we argued that, even if disbarment is not incrimination for purposes of the Fifth Amendment, it is nonetheless a penalty within the meaning of *Griffin v. California*, 380 U.S. 609, and no such penalty may be imposed by the courts for refusal to disclose information which is protected by the privilege. *Griffin v. California*, *supra*; *Malloy v. Hogan*, 378 U.S. 1, 8. Finally, we argued that the plain language of the Fifth Amendment prohibits the government, state and federal, from making a threat that deprives one of the opportunity to make a decision, in the "unfettered exercise of his own will," *Malloy v. Hogan*, 378 U.S. 1, 8, whether or not to respond to a governmental demand for information that is concededly protected by the privilege. Were it otherwise, he would unquestionably be *compelled* to testify against himself, under decisions of this Court which establish that the impermissible means of compulsion are not limited to physical brutality or the threat of imposition of those



sanctions traditionally associated with criminal proceedings. See *Miranda v. Arizona*, 384 U.S. 436; *Bram v. United States*, 168 U.S. 532, 547-8.

We believe that the above arguments require reversal of the judgment below. Still, we think it not inappropriate for the *amicus* to seek an elaboration of our position as to the scope of the privilege in its application to situations substantially different from the case at bar. Therefore, with the caveat that the validity of our position in this case does not depend upon the validity of our position regarding all the hypotheticals raised by the *amicus*, we outline in this reply brief our view as to the general classes of permissible and impermissible governmental action under the Fifth Amendment.

The inquiry here, of course, focuses not upon the use by the state of incriminatory information disclosed as a result of impermissible governmental conduct. But see *Garrity v. New Jersey*, No. 13, O.T. 1966. Rather, we are concerned here with what conduct the Fifth Amendment makes impermissible, that is, with what threats or promises the courts will prevent from being carried out if, as here, the person subjected to that conduct does not submit, but refuses to relinquish his privilege.

First, there is an area of governmental conduct so obviously not proscribed by the Fifth Amendment that it would hardly be worthy of mention were it not for the suggestion of the *amicus curiae* that its permissibility is questioned as a logical extension of our argument. Where an intrinsic and essential element of a person's function, whatever it may be, involves the furnishing of information, his refusal to do so, whether because of his reliance upon the privilege or otherwise, may properly subject him to being relieved of his responsibilities. Thus, a trustee who refuses to perform his duty to account or an attorney for a state agency who refuses to furnish

a legal opinion to that agency—in each instance in reliance upon the privilege against self-incrimination—may be removed from office even though he may not be made to disclose incriminating information.

A similar case would be that of a government employee who refuses to answer questions by his superior relating to the performance of his duties. Thus, we do not contend that a court clerk who refuses to answer a question by the court as to the whereabouts of court records in his custody or a national bank examiner who refuses to answer questions by the Comptroller of the Currency as to his procedures in preparing examination reports is insulated from discharge because the refusal is based upon the privilege. Dismissal in these cases is based not upon pleading the privilege against self-incrimination but rather upon the inability or unwillingness of the person involved to perform the very functions for which he has been employed.

Second, there is a class of instances in which a state may have an adequate basis for taking action against a person—i.e., imposing a sanction or withholding a benefit—independent of a refusal by that person to relinquish his privilege against self-incrimination. In these instances, the state is not precluded from taking that action merely because it has suggested to the person that his relinquishment of the privilege and cooperation with the state may dissuade it from doing so. Thus, a suggestion by a prosecuting attorney that he will move to dismiss one or more counts of a multi-count indictment or reduce a charge in the event that an indicated defendant enters a guilty plea does not necessarily make such a plea the product of compulsion, though in a particular case circumstances may lead to that conclusion. See, e.g., *Cortez v. United States*, 337 F. 2d 699 (9th Cir.), cert. denied,

381 U.S. 953; *Martin v. United States*, 256 F. 2d 345 (5th Cir.), *cert. denied*, 358 U.S. 921; *Crawford v. United States*, 219 F. 2d 207 (5th Cir. 1955). And if the defendant does not plead guilty the state is not precluded from prosecuting on all counts of such an indictment or on the original charge merely because the prosecuting attorney has suggested that a plea of guilty might influence prosecutorial discretion. But cf. *McClure v. Boles*, 233 F. Supp. 928 (N.D.W.Va.).

Similarly, if counsel for a judicial inquiry has evidence of misfeasance that will support the disbarment of an attorney, he should be able to advise the attorney that, if he gives testimony concerning matters of legitimate interest to the court, his cooperation will be taken into account in determining the severity of the sanction that may be imposed upon him. That factor might well influence the decision to relinquish the privilege. But, standing alone, it would not establish "compulsion" within the meaning of the Fifth Amendment, and if the attorney refuses to testify, the court may proceed to disbar him *on the basis of the independent evidence in its possession*.

Included within this class of cases is a subcategory in which a governmental refusal to take certain action (e.g., the grant of a license or the lease of government property) may properly be based upon the absence of sufficient information rather than upon the possession of affirmative evidence. Furthermore, in some carefully circumscribed instances, it may be appropriate to impose the obligation to furnish that information upon an applicant for a license or governmental benefit. Thus, an applicant for admission to the bar may be required to demonstrate that he is a person of good character, and, his refusal to answer certain relevant questions may make it difficult for him to make the necessary showing. If he



fails to do so, his application may properly be denied, not because he has pleaded the privilege against self-incrimination but because his good character has not been established. As we show below, however, he may not be denied the opportunity to make the necessary showing simply because he has invoked the privilege against self-incrimination.

Another example of this kind of case is furnished by *Blumenthal v. F.C.C.*, 318 F. 2d 276 (D.C. Cir.), cert. denied, 373 U.S. 951, which, for reasons given below, we believe to have been incorrectly decided. In that case, the Court of Appeals upheld the Federal Communications Commission, which had denied a radio operator's license to persons who had pleaded the privilege against self-incrimination. The same court had held, in the earlier case of *Borrow v. F.C.C.*, 285 F. 2d 666, cert. denied, 364 U.S. 892, that the Commission was authorized, by virtue of its power to prescribe the qualifications of station operators, to inquire into whether applicants had been members of the Communist Party or of groups which advocate the overthrow of the government. In response to such inquiries the petitioners in the *Blumenthal* case invoked the privilege against self-incrimination. The court held that while the free exercise of the privilege undoubtedly had been impaired by the Commission's action, the Commission could nonetheless validly refuse the license because it did not have sufficient information about the qualifications of the applicants to warrant a grant.<sup>1</sup>

This description of governmental conduct that is permissible, although it takes place in a context that includes

<sup>1</sup> This case is analytically similar to the hypothetical question raised by *amicus curiae*, on page 18 of its brief, relating to driver's licenses.



the exercise of the privilege, helps to delineate the governmental conduct that constitutes impermissible compulsion under the Fifth Amendment:

First, there can be little doubt that no governmental action may be imposed for the purpose of punishing an individual for his invocation of the privilege, in light of the standard of *Malloy* and *Griffin* that one's silence in reliance upon the Fifth Amendment may not be penalized. If a sanction is imposed for the purpose of penalizing an individual for his reliance upon the privilege, then, without regard to the character of that sanction, it is necessarily punitive in nature and impermissible. Cf. *Noto v. United States*, 76 S. Ct. 255, 100 L. Ed. 1518 (Memorandum of Harlan, J.); *Noto v. United States*, 351 U.S. 902.

Second, the government may not impose sanctions or withhold benefits solely because of one's invocation of the privilege, whatever may be its purpose in doing so. Where the government's action is based not upon independent grounds but only upon the invocation of the privilege, that action necessarily involves drawing adverse inferences from such invocation, in violation of this Court's decisions in *Grunewald v. United States*, 353 U.S. 391, and *Slochower v. Board of Education*, 350 U.S. 551. See also *Board of Public Education v. Intille*, 401 Pa. 1, 163 A. 2d 420, *cert. denied*, 364 U.S. 910.

Third, while a state may prescribe non-arbitrary conditions for the receipt of some governmental benefit, or for grant of a license to carry on an occupation that is subject to regulation, it may not, by legislative fiat, declare that an obligation to cooperate with a regulatory authority by answering all questions that may be asked is a necessary part of that occupation when, in fact, it is not. The power to regulate the dispensation of bene-

fits does not include the power arbitrarily to require relinquishment of the privilege against self-incrimination, any more than of other rights protected by the Constitution. See, e.g., *Sherbert v. Verner*, 374 U.S. 398; *Steinberg v. United States*, 143 Ct. Cl. 1, 163 F. Supp. 590; see generally Reich, *The New Property*, 73 Yale L. J. 733 (1964).

Finally, as we have indicated above, there are limitations upon the government's action in those cases in which it may act or refuse to act on the basis of one's failure to meet a burden of proof. *Speiser v. Randall*, 357 U.S. 513. Since it is obvious that government action of this type does tend to inhibit the exercise of the privilege against self-incrimination, and also that there may be strong temptation to use the "no information" rationale as a cloak for drawing impermissible inferences of guilt, bad moral character, or other unfitness from the invocation of the privilege, this class of cases should be rigidly circumscribed. Thus, there must be adequate justification for placing the burden of proof upon the individual rather than the government. In this connection, the difference between the grant of an initial license and the imposition of a heavy sanction—as in the case of revoking a license long held—might be relevant, as might the practical difficulties faced by the government in securing independent information.

Even in those instances, however, in which the burden of proof may be imposed upon an applicant for a license or other benefit, the government may not prescribe as a matter of law that one's burden can be satisfied only if he provides information by his own sworn testimony, in the face of assertion of the privilege. This would amount to the adoption of an irrebuttable presumption that the testimony, if given, would be adverse and of sufficient

weight to overcome any favorable evidence that might be presented. As we have stated, no such presumption or inference may be drawn from the invocation of the privilege against self-incrimination. See *Griffin v. California*, *supra*; *Grunewald v. United States*, *supra*. Indeed, in *Boyd v. United States*, 116 U.S. 616, the Court held unconstitutional under the Fourth and Fifth Amendments a federal statute which created, in suits for forfeiture of property, an irrebuttable presumption that documents which were not produced would prove any allegations that the government contended they would prove.

We recognize, of course, that the existence of certain qualifications may be easier to establish than others in circumstances where the applicant's own testimony is unavailable. For example, good character will frequently be quite readily established even by an applicant who refuses to answer certain questions upon constitutional grounds. See *Konigsberg v. State Bar*, 353 U.S. 252, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, in which just such showings were made.<sup>2</sup> It is much harder to show that one has never been a member of a subversive organization without making a sworn denial. The principle is

<sup>2</sup> In the second *Konigsberg* case, 366 U.S. 36, the Court held that, while its first decision precluded the state from drawing any inference of bad character from a refusal to answer questions, the state could constitutionally deny petitioner admission to the bar for his refusal "to provide unprivileged answers to questions having a substantial relevance to his qualifications." *Id.*, at 44 (emphasis added). The Court found the petitioner's refusals, based solely on First and not Fifth Amendment grounds, see *id.*, at 38, to be unprivileged in that his First Amendment rights were outweighed by the state's interest. *Id.*, at 52. As we noted in our opening brief, at p. 88, n. 17, this Court has not adopted the view that the Fifth Amendment privilege may be removed by balancing it against other interests. Where the refusal to answer is based upon the Fifth Amendment, denial of a license may not be based upon that refusal. A determination must be made whether the other evidence available to the tribunal warrants the issuance of the license.



the same in both cases, however, in that the opportunity to meet one's burden of proof may not be denied merely because of his reliance upon the privilege. It is in this respect—the failure to provide that opportunity—that the decision in *Blumenthal* was in error. An agency may not refuse a hearing by asserting that the required showing may be made *only* by sworn testimony of the applicant, in the face of the applicant's assertion of the privilege against self-incrimination.<sup>3</sup> That position is consistent only with the conclusion that a license is to be denied not because of insufficient information but merely because of assertion of the privilege.

The discussion above relates, of course, to the *amicus curiae*'s concern about the logical extensions of our position as to the scope of the Fifth Amendment, and the bulk of the foregoing discussion is quite distant from the facts of this case. Thus, clearly we are not here concerned with the class of cases which provide the most difficult problems in this area—those cases in which the government may base its action upon failure of an individual to meet a burden of proof. Petitioner here met his burden of proof of qualification for admission to the bar over 40 years ago, and he has practiced under his

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<sup>3</sup> *Kimm v. Rosenberg*, 363 U.S. 405, is not to the contrary. There, petitioner had applied for suspension of a deportation order, under a federal statute authorizing the Attorney General to exercise his discretion to suspend deportation of persons in the class eligible under the statute. The Court, over the dissent of four of its members, interpreted the statute as making eligible only those aliens who were not members of the Communist Party and held that the applicant had the burden of proof of his eligibility. Petitioner offered no evidence as to his non-membership in the Party and refused, on Fifth Amendment grounds, to answer the question whether he was a member; and the Court held that assertion of the privilege did not relieve him of his burden of proof. Nothing in the Court's opinion indicates, however, that petitioner's burden could be met only by relinquishing the privilege, and the Court specifically noted that petitioner "offered no evidence" as to his non-membership. *Id.*, at 407.



license since that time. Even assuming that the state could constitutionally adopt a procedure by which attorneys of unblemished standing could be called before a special inquiry from time to time and given the burden of re-establishing their good character, either for no reason at all or for the reason that an active contingent fee practice is thought to raise the likelihood of unethical behavior, see Brief for Respondent, p. 5, no one has cited any statute or regulation which imposed any burden of proof upon petitioner in these proceedings. In the Judicial Inquiry, while the record indicates that the practice of that body is to call very active attorneys before it merely on the chance that some unethical practices might be found (R. 37), no charges were made against petitioner and he was not advised that he must prove or disprove anything in particular. And, in the disciplinary proceeding which resulted in the order of disbarment here at issue, the referee's report clearly establishes that the burden of proof as to all charges rested upon respondent Klein (the petitioner in that proceeding) and not upon petitioner (R. 62, 78).

Neither is this a case in which the state's action—disbarment—was based upon independent evidence of misconduct which was called to petitioner's attention in an effort to influence him to relinquish his privilege. The state did, of course, threaten disbarment in an effort to induce petitioner to relinquish his privilege, but the basis for that threat was not an independent ground for disciplinary action but rather the refusal to relinquish the privilege, itself. And, finally, we are not here faced with a situation in which one's decision to invoke the privilege makes him incapable of performing the duties of his employment, as in the frequently cited case of the trustee who refuses to account. To be sure, the Appellate Division in this case held that petitioner's reliance upon his

"absolute right to invoke his constitutional privilege against self-incrimination" amounted to a failure to fulfill his "inherent duty" to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar [R.84-5] but, as we have shown in our opening brief, at pp. 26-9, that "inherent duty" was asserted to be inherent only after the Judicial Inquiry found that the exercise of their state privilege against self-incrimination by attorneys called before the Inquiry forced the Inquiry's counsel to develop independent evidence of the facts. Thus, the Inquiry developed *Cohen v. Hurley*, 7 N.Y. 2d 488, 166 N.E. 2d 672, *aff'd*, 366 U.S. 117, as a test case, and that case negated the long-recognized position of the New York courts that the exercise of the privilege against self-incrimination "cannot be a breach of duty to the court." *In re Grace*, 282 N.Y. 428, 435, 26 N.E. 2d 963, 967. A duty that is not in fact an inherent part of the function of a lawyer—and over a century of experience shows that an obligation to give incriminating testimony is not an inherent part of a lawyer's responsibilities—cannot be presumed or declared to be so by a legislature or by a Court exercising administrative functions. (Cf. *United States v. Romano*, 382 U.S. 136; *Tot v. United States*, 319 U.S. 463.)

We do not question that an attorney has a general obligation to cooperate with bodies such as the Judicial Inquiry in uncovering unethical practices relating to the profession, but it is quite another matter to say that an essential, inherent part of the attorney's function is testifying in such proceedings, whether or not the purpose in calling him is a fishing expedition to uncover any infractions which he may have committed. Certainly the traditional applications of the ethical canons requiring candor and cooperation with the courts have not embraced situations such as the case at bar. See Drinker, *Legal*

*Ethics*, 59, 69-75 (1954); Wise, *Legal Ethics*, 171-190 (1966). We note that courts and commentators have distinguished the function of an attorney from that of a policeman in this regard, concluding that an attorney may not be disciplined for a refusal to testify based upon the privilege against self-incrimination, even though a policeman may be dismissed. See *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543; Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 499-508 (1957). Whether or not a policeman's specific function of reporting to his superiors all information concerning illicit activity permits his dismissal for refusing to disclose such information in reliance upon the privilege, it is clear that the policeman's relationship to the department which employs him differs from the private attorney's relationship to the courts. See *Cammer v. United States*, 350 U.S. 399.

Thus, as we have shown, the state's action in disbarring petitioner does not fall within the categories of governmental conduct which are consistent with the guaranties of the privilege against self-incrimination. As we argued in our opening brief, at pp. 26-9, the record in this case and the proceedings in other cases which reached this Court concerning the Judicial Inquiry at issue here strongly indicate that the state's action was imposed for the purpose of punishing attorneys who claim the privilege. At the least, the record establishes that the action was based solely upon exercise of the privilege. In short, what the state did here was to threaten disbarment, based upon no grounds other than refusal to relinquish the privilege, as a means of compelling petitioner to disclose information which concededly was within the protection of the privilege. When the threat failed to compel peti-

\* We have dealt fully in our opening brief with the arguments of respondent and of amicus curiae, the Association of the Bar of the



tioner to relinquish his privilege, the state then carried out that threat. The position of the state was clear: "If he elects to invoke his constitutional privilege against self-incrimination . . . he cannot at the same time retain his privilege of membership at the bar [R. 85]." The position of the Constitution seems to us also to be clear: no one may be compelled by the state to incriminate himself, and no one may be penalized by the state for refusing to do so. The action of the state in disbarring petitioner is in violation of the guaranties of the Fifth Amendment, as protected against state action by the Fourteenth Amendment.

Respectfully submitted,

LAWRENCE J. LATTO,  
WILLIAM H. DEMPSEY, JR.,  
MARTIN J. FLYNN,  
734 Fifteenth Street, N.W.,  
Washington, D.C. 20005,  
*Attorneys for Petitioner.*

*Of Counsel:*

BERNARD SHATZKIN,  
235 East 42nd Street,  
New York 17, New York.

SHEA & GARDNER,  
734 Fifteenth Street, N.W.,  
Washington, D.C. 20005.

City of New York, that the records demanded from petitioner were not protected by the privilege. The *amicus curiae* does not adopt respondent's curious position, contradictory of his own petition for disciplinary action against petitioner and of the record and opinions of the courts below, that the disbarment was based solely upon refusal to produce the records. We have dealt with that argument in our opening brief and in our reply to respondent's brief in opposition to the petition for certiorari.



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**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1966**

**No. 62**

**SAMUEL SPEVACK,**

*Petitioner,*

**—against—**

**SOLOMON A. KLEIN,**

*Respondent.*

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF NEW YORK**

**BRIEF OF THE NEW YORK CIVIL LIBERTIES  
UNION AMICUS CURIAE**

**EMANUEL REDFIELD**

**Counsel, New York Civil Liberties Union  
60 Wall Street  
New York, N. Y. 10005**

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IN THE  
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**October Term, 1966**

No. 62

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SAMUEL SPEVACK,

*Petitioner,*

—against—

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*Respondent.*

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**BRIEF OF THE NEW YORK CIVIL LIBERTIES  
UNION AMICUS CURIAE**

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**Statement of Interest**

The New York Civil Liberties Union is interested in this review because the issue presented raises a grave problem: whether a member of a profession may be coerced under the threat of disbarment, into waiving the right against self-incrimination as protected by the Constitution of the United States.

Because *Cohen v. Hurley*, 366 U.S. 117, was decided before *Malloy v. Hogan*, 378 U.S. 1 imported the Fifth Amendment's right against self-incrimination into the Fourteenth Amendment and thereby made applicable to the states, the question before the court is whether *Malloy* has overruled *Cohen v. Hurley*.

We urge that it has. The Supreme Court in *Cohen* rejected Cohen's contention that due process protected his right to plead against self-incrimination because the coercive force of threat of disbarment operated to deny him the right to remain silent. The court held that since an attorney owed a duty of candor and cooperation to the courts, due process did not help him. But the court arrived at that conclusion—the one based on *due process*,—because it proceeded from the premise that the Fifth Amendment did not apply to state action and therefore the right, as such, could find no federal protection.

With *Malloy*, however, the protection that any person may invoke, is now of federal concern.

In deciding *Malloy*, the Supreme Court made specific reference to *Cohen* and said (p. 10):

“The court thus has rejected the notion that the Fourteenth Amendment applies to the states only a ‘watered-down subjective version of the Bill of Rights’, . . . If *Cohen v. Hurley*, 366 U. S. 117, 6 L. Ed. 156, 81 S. Ct. 954, and *Adamson v. California*, *supra*, suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the Twinning view of the privilege has been eroded.”

There is no difference in principle between *Malloy* and the present case. *Malloy* was subpoenaed in a judicial inquiry conducted by the state of Connecticut concerned with gambling and other criminal activities. *Malloy* refused to answer any questions upon the ground of possible self-incrimination. The state courts held the claim untenable under state law. The Supreme Court, however, applied

the federal Constitution and allowed the plea under the Fifth Amendment.

In this case the lawyer was subpoenaed before a judicial inquiry to give testimony and to produce records. Production of records is as much protected against self-incrimination as is testimony. *Boyd v. United States*, 116 U.S. 616. Since the records of petitioner were obviously private as well as confidential, the rule would apply.

The right against self-incrimination was invoked with the resultant disbarment as a lawyer. The duress of the disciplinary proceeding is a sufficient deterrent in most cases against the invocation of the constitutional right. And it should be emphasized that the denial or revocation because of the resort to a constitutional right of a license to practice one's profession is not disqualification only, but is punishment. (*Cummings v. Missouri*, 4 Wall 277.) Consequently, it is a burden on the exercise of the constitutional right.

May the federal right to plead against self-incrimination be outweighed in balancing other interests, such as an attorney's duty to the court to be candid and to cooperate? The answer is that the right is an absolute one, which even the lowliest person has. Rights incorporated into the Fourteenth Amendment are not to be "watered-down". See *Malloy and Gideon v. Wainright*, 377 U. S. 335, 343-344, 346. There is no basis for applying the right differently to different types of persons, depending upon their occupations. Once the door is opened, even a tiny bit, to permit entry of a balancing of the right based on distinctions in occupations, the right will become susceptible to destruction by applications tailored for the expedient moment.

Lawyers owe no more duty to surrender the right than others. To state that they must be candid and cooperative begs the question. The words "be candid" and "be cooperative" are mere labels for the idea that lawyers be required to waive the constitutional privilege.

Since the privilege is constitutionally protected, any duress, such as threat of the disbarment of an attorney, fetters the exercise of the right. It is an unconstitutional condition which this Court has opposed. *Slochower v. Board of Education*, 350 U. S. 551.

Respectfully submitted,

EMANUEL REDFIELD

Counsel, New York Civil Liberties Union.



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# SUPREME COURT OF THE UNITED STATES

No. 62.—OCTOBER TERM, 1966.

Samuel Spevack, Petitioner, | On Writ of Certiorari to  
v. | the Court of Appeals of  
Solomon A. Klein. | the State of New York.

[January 16, 1967.]

MR. JUSTICE DOUGLAS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur.

This is a proceeding to discipline petitioner, a member of the New York Bar, for professional misconduct. Of the various charges made, only one survived, *viz*, the refusal of petitioner to honor a *subpoena duces tecum* served on him in that he refused to produce the demanded financial records and refused to testify at the judicial inquiry. Petitioner's sole defense was that the production of the records and his testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered petitioner disbarred, holding that the constitutional privilege against self-incrimination was not available to him in light of our decision in *Cohen v. Hurley*, 366 U. S. 117. See 24 App. Div. 2d 653. The Court of Appeals affirmed, 16 N. Y. 2d 1048, 213 N. E. 2d 457, 17 N. Y. 2d 490, 214 N. E. 2d 373. The case is here on certiorari which we granted to determine whether *Cohen v. Hurley*, *supra*, had survived *Malloy v. Hogan*, 378 U. S. 1.

*Cohen v. Hurley* was a five-to-four decision rendered in 1961. It is practically on all fours with the present case. There, as here, an attorney relying on his privilege against self-incrimination refused to testify and was disbarred. The majority of the Court allowed New York to construe her own privilege against self-incrimination so as not to make it available in judicial

inquiries of this character (366 U. S., at 125-127) and went on to hold that the Self-Incrimination Clause of the Fifth Amendment was not applicable to the States by reason of the Fourteenth. *Id.*, at 127-129. The minority took the view that the full sweep of the Fifth Amendment had been absorbed into the Fourteenth and extended its protection to lawyers as well as other persons.

In 1964 the Court in another five-to-four decision held that the Self-Incrimination Clause of the Fifth Amendment was applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 U. S. 1. While *Cohen v. Hurley* was not overruled, the majority indicated that the principle on which it rested had been seriously eroded. 378 U. S., at 11. One minority view espoused by Mr. JUSTICE HARLAN and Mr. JUSTICE CLARK stated that *Cohen v. Hurley* flatly decided that the Self-Incrimination Clause of the Fifth Amendment was not applicable against the States (*id.*, at 17) and urged that it be followed. The others in dissent—Mr. JUSTICE WHITE and Mr. JUSTICE STEWART—thought that on the facts of the case the privilege was not properly invoked and that the state trial judge should have been sustained in ruling that the answers would not tend to incriminate. *Id.*, at 33-38.

The Appellate Division distinguished *Malloy v. Hogan* on the ground that there the petitioner was not a member of the Bar. 24 App. Div. 2d, at 654. And the Court of Appeals rested squarely on *Cohen v. Hurley* as one of the two grounds for affirmance.

And so the question emerges whether the principle of *Malloy v. Hogan* is inapplicable because petitioner is a

<sup>1</sup> "Order affirmed on the authority of *Cohen v. Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis v. United States*, 328 U. S. 582; *Shapiro v. United States*, 335 U. S. 1)." 16 N. Y. 2d 1048, 1050, 213 N. E. 2d 457-458.



member of the Bar. We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. These views, expounded in the dissents in *Cohen v. Hurley*, need not be elaborated again.

We said in *Malloy v. Hogan*:

"The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U. S., at 8.<sup>2</sup>

In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U. S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." *Id.*, at 614. We held in that case that the Fifth Amendment, operating through the Fourteenth, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.*, at 615. What we said in *Malloy*

<sup>2</sup> *Kimm v. Rosenberg*, 363 U. S. 405, much relied on here, was a five-to-four decision the other way and accurately reflected the pre-*Malloy v. Hogan* construction of the Fifth Amendment. We do not stop to re-examine all the other prior decisions of that vintage to determine which of them, if any, would be decided the other way because of "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence," as declared in *Malloy v. Hogan*, *supra*, at 8. (Italics added.)

and *Griffin* is in the tradition of the broad protection given the privilege at least since *Boyd v. United States*, 116 U. S. 616, 634-635, where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself.

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." 116 U. S., at 635.

The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . . ." *United States v. White*, 322 U. S. 694, 698. As we recently stated in *Miranda v. Arizona*, 384 U. S. 436, 461, "In this Court, the privilege has consistently been accorded a liberal construction." It is in that tradition that we overrule *Cohen v. Hurley*. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person . . . shall be compelled in any criminal case to be a witness against

himself"; and we can imply no exception. Like the school teacher in *Slochower v. Board of Education*, 350 U. S. 551, and the policeman<sup>3</sup> in *Garrity v. New Jersey*, ante, p. —, lawyers also enjoy first-class citizenship.

The Court of Appeals alternately affirmed the judgment disbaring petitioner on the ground that under *Shapiro v. United States*, 335 U. S. 1, and the required records doctrine he was under a duty to produce the withheld records. The Court of Appeals did not elaborate on the point; nor did the Appellate Division advert to it. At the time in question the only Rule governing the matter was entitled "Preservation of Records of Actions, Claims and Proceedings."<sup>4</sup> It provided that in cases involving "contingent fee compensation" attorneys for all the parties shall preserve "the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought."

The documents sought in the subpoena were petitioner's day book, cash receipts book, cash disbursements book, check book stubs, petty cash book and vouchers, general ledger and journal, canceled checks and bank statements, pass books and other evidences of accounts, record of loans made, payroll records, and state and federal tax returns and work sheets relative thereto.

The *Shapiro* case dealt with a federal price control regulation requiring merchants to keep sales records.

<sup>3</sup> Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach.

<sup>4</sup> Rule 5 of the Special Rules of the Second Dept., Appellate Division. Rule 5 was subsequently amended and renumbered as Special Rule IV (6). See Civil Practice Annual of New York 9-24 (1964).



The Court called them records with "public aspects," as distinguished from private papers (335 U. S., at 34); and concluded by a divided vote that their compelled production did not violate the Fifth Amendment. We are asked to overrule *Shapiro*. But we find it unnecessary to reach it.

Rule 5, requiring the keeping of records, was broad and general—"the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the dispute thereof." The detailed financial aspects of contingent fee litigation demanded might possibly by a broad, generous construction of the Rule be brought within its intendment. Our problem, however, is different. Neither the referee of the inquiry, nor counsel for the inquiry, nor the Appellate Division of the New York Supreme Court questioned the applicability of the privilege against self-incrimination to the records. All proceeded on the basis that petitioner could invoke the privilege with respect to the records, but that the price he might have to pay was disbarment. The Court of Appeals was the first to suggest that the privilege against self-incrimination was not applicable to the records. Petitioner, however, had been disbarred on the theory that the privilege was applicable to the records, but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole v. Arkansas*, 333 U. S. 196, 201. For that procedure would deny him all opportunity at the trial to show that the Rule, fairly construed and understood, should not be given such a broad sweep \* and

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\* Counsel for respondent conceded on oral argument that the subpoena was broader than Rule 5:

"Q. Is this subpoena coextensive with the provisions of the order about keeping the financial records or does the subpoena go beyond?

"A. I would say in my judgment it goes beyond. . . . There is room for reasonable argument that some of the items called for



to make a record that the documents demanded by the subpoena had no "public aspects" within the required records rule but were private papers. *Reversed.*

in the subpoena might perhaps be argued to not come within the required records I am talking about.

"Q. Would you mind relating those to us? Tell us what those are. . . . Cash disbursements?

"A. I would say do come under the records. . . . I would exclude as not coming within the statute the federal and state tax returns for example. . . .

"Q. How about worksheets . . . ?

"A. Worksheets? Out. . . .

"Q. You mean all of item 12 . . . would be out?

"A. Item 12—copies of federal and state tax returns, accountants' worksheets, and all other . . . I do not include them.

"Q. They would all be outside the rules?

"A. Yes.

"Q. But the demand was for records beyond the records that he was required to keep.

"A. [T]he New York Court of Appeals, speaking for the State of New York, says these are required records.

"Q. I suppose that if he produced just the records that were required—that he was required to keep—that that might very well constitute a waiver as to other records.

"A. No, no it would not. . . .

"Q. Why not?

"A. Because if the other records were held not to come within the required records doctrine he would have the privilege to do that, but he has no privilege.

"Q. I am not sure. Are you sure about that? . . . I would say that the common understanding is that if he produces some of the records relating to a given subject matter, that is a waiver of privilege as to the balance of the records relating to the subject matter. Am I wrong about that?

"A. I would not agree with that. It is an argument that could be made but I would disagree with it for this reason. Under the doctrine of *Shapiro v. United States*, he has no Fifth Amendment privilege as to records that are required to be kept. He does have Fifth Amendment privilege as to records he is not required to keep and also as to refusal to give oral testimony."

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# SUPREME COURT OF THE UNITED STATES

No. 62.—OCTOBER TERM, 1966.

Samuel Spevack, Petitioner, | On Writ of Certiorari to  
v. | the Court of Appeals of  
Solomon A. Klein. | the State of New York.

[January 16, 1967.]

MR. JUSTICE FORTAS, concurring.

I agree that *Cohen v. Hurley*, 366 U. S. 117 (1961), should be overruled. But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding. *Garrity v. New Jersey*, *post*, —.

But a lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State. His responsibility to the State is to obey its laws and the rules of conduct that it has generally laid down as part of its licensing procedures. The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights. Accordingly, I agree that Spevack could not be disbarred for asserting his privilege against self-incrimination.

If this case presented the question whether a lawyer might be disbarred for refusal to keep or to produce, upon properly authorized and particularized demand, records which the lawyer was lawfully and properly required to keep by the State as a proper part of its functions in relation to him as licensor in his high calling, I should feel compelled to vote to affirm, although I would be prepared in an appropriate case to re-examine the scope of the principle which *Shapiro* announces. I am not prepared to indicate doubt as to the essential validity of *Shapiro v. United States*, 335 U. S. 1 (1948). However, I agree that the required records issue is not appropriately presented here, for the reasons stated by my Brother DOUGLAS. On this basis I join in the order of the Court.



# SUPREME COURT OF THE UNITED STATES

No. 62.—OCTOBER TERM, 1966.

Samuel Spevack, Petitioner, | On Writ of Certiorari to  
v. | the Court of Appeals of  
Solomon A. Klein. | the State of New York.

[January 16, 1967.]

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

This decision, made in the name of the Constitution, permits a lawyer suspected of professional misconduct to thwart direct official inquiry of him without fear of disciplinary action. What is done today will be disheartening and frustrating to courts and bar associations throughout the country in their efforts to maintain high standards at the bar.

It exposes this Court itself to the possible indignity that it may one day have to admit to its own bar such a lawyer unless it can somehow get at the truth of suspicions, the investigation of which the applicant has previously succeeded in blocking. For I can perceive no distinction between "admission" and "disbarment" in the rationale of what is now held. The decision might even lend some color of support for justifying the appointment to the bench of a lawyer who, like petitioner, prevents full inquiry into his professional behavior. And, still more pervasively, this decision can hardly fail to encourage oncoming generations of lawyers to think of their calling as imposing on them no higher standards of behavior than might be acceptable in the general marketplace. The soundness of a constitutional doctrine carrying such denigrating import for our profession is surely suspect on its face.

Six years ago a majority of this Court, in *Cohen v. Hurley*, 366 U. S. 117, set its face against the doctrine that now prevails, bringing to bear in support of the Court's holding, among other things, the then established constitutional proposition that the Fourteenth Amendment did not make applicable to the States the Fifth Amendment as such. Three years later another majority of the Court, in *Malloy v. Hogan*, 378 U. S. 1, decided to make the Fifth Amendment applicable to the States and in doing so cast doubt on the continuing vitality of *Cohen v. Hurley*. The question now is whether *Malloy* requires the overruling of *Cohen* in its entirety. For reasons that follow I think it clear that it does not.

It should first be emphasized that the issue here is plainly not whether lawyers may "enjoy first-class citizenship." Nor is the issue whether lawyers may be deprived of their federal privilege against self-incrimination, whether or not criminal prosecution is undertaken against them. These diversionary questions have of course not been presented or even remotely suggested by this case either here or in the courts of New York. The plurality opinion's vivid rhetoric thus serves only to obscure the issues with which we are actually confronted, and to hinder their serious consideration. The true question here is instead the proper scope and effect of the privilege against self-incrimination under the Fourteenth Amendment in state disciplinary proceedings against attorneys.<sup>1</sup> In particular, we are required to determine whether petitioner's disbarment for his failure to provide information relevant to charges of misconduct in

<sup>1</sup> No claim has been made either here or in the state courts that the underlying facts representing petitioner's alleged conduct were not such as to entitle him to claim the privilege against self-incrimination. We therefore deal with the case on the premise that his claim of privilege was properly asserted.

carrying on his law practice impermissibly vitiated the protection afforded by the privilege. This important question warrants more complete and discriminating analysis than that given to it by the plurality opinion.

This Court reiterated only last Term that the constitutional privilege against self-incrimination "has never been given the full scope which the values it helps to protect suggest." *Schmerber v. California*, 384 U. S. 757, 762. The Constitution contains no formulae with which we can calculate the areas within this "full scope" to which the privilege should extend, and the Court has therefore been obliged to fashion for itself standards for the application of the privilege. In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public interests involved. See, e. g., *Orloff v. Willoughby*, 345 U. S. 83; *Davis v. United States*, 328 U. S. 582; *Shapiro v. United States*, 335 U. S. 1. If, as *Malloy v. Hogan*, *supra*, suggests, the federal standards imposed by the Fifth Amendment are now to be extended to the States through the Fourteenth Amendment, see also *Griffin v. California*, 380 U. S. 609, it would follow that these same factors must be no less relevant in cases centering on Fourteenth Amendment claims. In any event, the construction consistently given to the Fourteenth Amendment by this Court would require their consideration. *Bates v. City of Little Rock*, 361 U. S. 516. I therefore first turn to these factors to assess the validity under the Fourteenth Amendment of petitioner's disbarment.

It cannot be claimed that the purposes served by the New York rules at issue here, compendiously aimed at "ambulance chasing" and its attendant evils, are unimportant or unrelated to the protection of legitimate state interests. This Court has often held that the

States have broad authority to devise both requirements for admission and standards of practice for those who wish to enter the professions. *E. g.*, *Hawker v. New York*, 170 U. S. 189; *Dent v. West Virginia*, 129 U. S. 118; *Barsky v. Board of Regents*, 347 U. S. 442. The States may demand any qualifications which have "a rational connection with the applicant's fitness or capacity," *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 239, and may exclude any applicant who fails to satisfy them. In particular, a State may require evidence of good character, and may place the onus of its production upon the applicant. *Konigsberg v. State Bar of California*, 366 U. S. 36. Finally, a State may without constitutional objection require in the same fashion continuing evidence of professional and moral fitness as a condition of the retention of the right to practice. *Cohen v. Hurley*, 366 U. S. 117. All this is in no way questioned by today's decision.

As one prerequisite of continued practice in New York, the Appellate Division, Second Department, of the Supreme Court of New York has determined that attorneys must actively assist the courts and the appropriate professional groups in the prevention and detection of unethical legal activities. The Second Department demands that attorneys maintain various records, file statements of retainer in certain kinds of cases, and upon request provide information, all relevant to the use by the attorneys of contingent fee arrangements in such cases. These rules are intended to protect the public from the abuses revealed by a lengthy series of investigations of malpractices in the geographical area represented by the Second Department. It cannot be said that these conditions are arbitrary or unreasonable, or that they are unrelated to an attorney's continued fitness to practice. English courts since Edward I have endeavored to regulate the qualification and practice of



lawyers, always in hope that this might better assure the integrity and evenhandedness of the administration of justice.<sup>2</sup> Very similar efforts have been made in the United States since the 17th century.<sup>3</sup> These efforts have protected the systems of justice in both countries from abuse, and have directly contributed to public confidence in those systems. Such efforts give appropriate recognition to the principle accepted both here and in England that lawyers are officers of the court who perform a fundamental role in the administration of justice.<sup>4</sup> The rules at issue here are in form and spirit a continuation of these efforts, and accordingly are reasonably calculated to serve the most enduring interests of the citizens of New York.

Without denying the urgency or significance of the public purposes served by these rules, the plurality opinion has seemingly concluded that they may not be enforced because any consequence of a claim of the privilege against self-incrimination which renders that claim "costly" is an "instrument of compulsion" which impermissibly infringes on the protection offered by the privilege. Apart from brief *obiter dicta* in recent opinions of this Court, this broad proposition is entirely without support in the construction hitherto given to the privilege, and is directly inconsistent with a series of cases in which this Court has indicated the principles which are properly applicable here. The Court has not before held that the Federal Government and the States are forbidden to permit any consequences to result from a claim of

<sup>2</sup> The history of these efforts is outlined in Cohen, A History of the English Bar and *Attornatus* to 1450, 277 ff.; 2 Holdsworth, A History of English Law 317, 504 ff., 6 *id.*, 431 ff.

<sup>3</sup> These efforts are traced in Warren, History of the American Bar, *passim*.

<sup>4</sup> Evidences of this principle may be found in the opinions of this Court. See, e. g., *Ex parte Bradley*, 7 Wall. 364; *Powell v. Alabama*, 287 U. S. 45; *Gideon v. Wainwright*, 372 U. S. 335.

the privilege; it has instead recognized that such consequences may vary widely in kind and intensity, and that these differences warrant individual examination both of the hazard, if any, offered to the essential purposes of the privilege, and of the public interests protected by the consequence. This process is far better calculated than the broad prohibition embraced by the plurality to serve both the purposes of the privilege and the other important public values which are often at stake in such cases. It would assure the integrity of the privilege, and yet guarantee the most generous opportunities for the pursuit of other public values, by selecting the rule or standard most appropriate for the hazards and characteristics of each consequence.

One such rule has already been plainly approved by this Court. It seems clear to me that this rule is applicable to the situation now before us. The Court has repeatedly recognized that it is permissible to deny a status or authority to a claimant of the privilege against self-incrimination if his claim has prevented full assessment of his qualifications for the status or authority. Under this rule, the applicant may not both decline to disclose information necessary to demonstrate his fitness, and yet demand that he receive the benefits of that fitness. He may not by his interjection of the privilege either diminish his obligation to establish his qualifications, or escape the consequences exacted by the State for a failure to satisfy that obligation.

This rule was established by this Court in *Orloff v. Willoughby*, 345 U. S. 83. The Court there held that a doctor who refused, under a claim of the privilege against self-incrimination, to divulge whether he was a Communist was not entitled by right to receive a commission as an Army officer, although he had apparently satisfied every other prerequisite for a commission. The Court expressly noted that "no one believes that he can be

punished" for asserting the privilege, but said that it had "no hesitation" in holding that the petitioner nonetheless could not both rely on the privilege to deny relevant information to the commissioning authorities and demand that he be appointed to a position of "honor and trust." The Court concluded that "we cannot doubt that the President of the United States, before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness."

Analogous problems were involved in *Kimm v. Rosenberg*, 363 U. S. 405, in which the Court held that an alien whose deportation had been ordered was ineligible for a discretionary order permitting his voluntary departure. The alien was held to be ineligible because he had failed to establish that he was not affiliated with the Communist Party, in that he refused to answer questions about membership in the Party on grounds that the answers might incriminate him. The petitioner could not prevent the application of a sanction imposed as a result of his silence by interposing the privilege against self-incrimination as a basis for that silence.

These principles have also been employed by this Court to hold that failure to incriminate one's self can result in denial of the removal of one's case from a state to a federal court, *Maryland v. Soper (No. 1)*, 270 U. S. 9, and by the Fourth Circuit to hold that a bankrupt's failure to disclose the disposition of his property, although disclosure might incriminate him, requires the denial of a discharge in bankruptcy. *Kaufman v. Hurwitz*, 176 F. 2d 210.

This Court has applied similar principles in a series of cases involving claims under the Fourteenth Amendment. These cases all antedate *Malloy v. Hogan*, and thus are presumably now subject to the "federal standards," but until today those standards included the

principles of *Orloff v. Willoughby*, and *Malloy v. Hogan* therefore could not alone require a different result. The fulcrum of these cases has been *Slochower v. Board*, 350 U. S. 551. The appellant there was an associate professor at Brooklyn College who invoked the Fifth Amendment privilege before an investigating committee of the United States Senate, and was subsequently discharged from his position at the college by reason of that occurrence. The Court held that his removal was a denial of the due process demanded by the Fourteenth Amendment. Its reasons were apparently two: first, the Board had attached a "sinister meaning," in the form of an imputation of guilt, to Slochower's invocation of the privilege; and second, the Board was not engaged in a bona fide effort to elicit information relevant to assess the "qualifications of its employees." The state authorities "had possessed the pertinent information for twelve years," and in any event the questions put to Slochower by the committee were "wholly unrelated" to his university functions.

The elements of the holding in *Slochower* have subsequently been carefully considered on several occasions by this Court. See, e. g., *Beilan v. Board of Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Nelson v. Los Angeles County*, 362 U. S. 1. These cases, when read with *Slochower*, make plain that so long as state authorities do not derive any imputation of guilt from a claim of the privilege, they may in the course of a bona fide assessment of an employee's fitness for public employment require that the employee disclose information reasonably related to his fitness, and may order his discharge if he declines. Identical principles have been applied by this Court to applicants for admission to the bar who have refused to produce information pertinent to their professional and moral qualifications. *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re*



*Anastaplo*, 366 U. S. 82. In sum, all these cases adopted principles under the Fourteenth Amendment which are plainly congruent with those applied in *Orloff v. Willoughby*, *supra*, and other federal cases to Fifth Amendment claims.

The petitioner here does not contend, and the plurality opinion does not suggest, that the state courts have derived any inference of guilt from petitioner's claim of the privilege. The state courts have expressly disclaimed all such inferences. 24 App. Div. 2d 653, 654. Nor is it suggested that the proceedings against petitioner were not an effort in good faith to assess his qualifications for continued practice in New York, or that the information sought from petitioner was not reasonably relevant to those qualifications. It would therefore follow that under the construction consistently given by this Court both to the privilege under the Fifth Amendment and to the Due Process Clause of the Fourteenth Amendment, petitioner's disbarment is constitutionally permissible.

The plurality opinion does not pause either to acknowledge the previous handling of these issues or to explain why the privilege must now be supposed to forbid all consequences which may result from privileged silence. This is scarcely surprising, for the plurality opinion would create a novel and entirely unnecessary extension of the privilege which would exceed the needs of the privilege's purpose and seriously inhibit the protection of other public interests. The petitioner was not denied his privilege against self-incrimination, nor was he penalized for its use; he was denied his authority to practice law within the State of New York by reason of his failure to satisfy valid obligations imposed by the State as a condition of that authority. The only hazard in this process to the integrity of the privilege is the possibility that it might induce involuntary disclosures of incriminating materials; the sanction precisely calculated to elim-

inate that hazard is to exclude the use by prosecuting authorities of such materials and of their fruits. This Court has, upon proof of involuntariness, consistently forbidden their use since *Brown v. Mississippi*, 297 U. S. 278, and now, as my Brother WHITE has emphasized, the plurality has intensified this protection still further with the broad prohibitory rule it has announced today in *Garrity v. New Jersey*, *supra*. It is true that this Court has on occasion gone a step further, and forbidden the practices likely to produce involuntary disclosures, but those cases are readily distinguishable. They have uniformly involved either situations in which the entire process was thought both to present excessive risks of coercion and to be foreign to our accusatorial system, as in *Miranda v. Arizona*, 384 U. S. 436, or situations in which the only possible purpose of the practice was thought to be to penalize the accused for his use of the constitutional privilege, as in *Griffin v. California*, 380 U. S. 609. Both situations are plainly distant from that in issue here. None of the reasons thought to require the prohibitions established in those cases have any relevance in the situation now before us; nothing in New York's efforts in good faith to assure the integrity of its judicial system destroys, inhibits, or even minimizes the petitioner's constitutional privilege. There is therefore no need to speculate whether lawyers, or those in any other profession or occupation, have waived in some unspecified fashion a measure of the protection afforded by the constitutional privilege; it suffices that the State is earnestly concerned with an urgent public interest, and that it has selected methods for the pursuit of that interest which do not prevent attainment of the privilege's purposes.

I think it manifest that this Court is required neither by the logic of the privilege against self-incrimination nor by previous authority to invalidate these state rules, and thus to overturn the disbarment of the petitioner.

Today's application of the privilege serves only to hamper appropriate protection of other fundamental public values.<sup>5</sup>

In view of these conclusions, I find it unnecessary to reach the alternative basis of the Court of Appeals' decision, the "required records doctrine." See *Shapiro v. United States*, 335 U. S. 1.

I would affirm the judgment of disbarment.

<sup>5</sup> It should be noted that the principle that a license or status may be denied to one who refuses, under the shelter of the constitutional privilege, to disclose information pertinent to that status or privilege, has been adopted in a variety of situations by statute. See, e. g., 12 U. S. C. § 481; 47 U. S. C. §§ 308 (b), 312 (a) (4); 5 U. S. C. § 2283.

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# SUPREME COURT OF THE UNITED STATES

Nos. 13 AND 62.—OCTOBER TERM, 1966.

Edward J. Garrity et al.,  
Appellants,  
13 v.  
State of New Jersey.

On Appeal From the Supreme  
Court of New Jersey.

Samuel Spevack,  
Petitioner,  
62 v.  
Solomon A. Klein.

On Writ of Certiorari to the  
Court of Appeals of the  
State of New York.

[January 16, 1967.]

MR. JUSTICE WHITE, dissenting.

In No. 13, *Garrity v. New Jersey*, the Court apparently holds that in every imaginable circumstance the threat of discharge issued by one public officer to another will be impermissible compulsion sufficient to render subsequent answers to questions inadmissible in a criminal proceeding. I would agree that in some, if not in most, cases this would be the proper result. But the circumstances of such confrontations are of infinite variety. Rather than the Court's inflexible, *per se* rule, the matter should be decided on the facts of each particular case. In the situation before us now, I agree with my Brother HARLAN that the findings of the two courts below should not be overturned.

However that may be, with *Garrity* on the books, the Court compounds its error in *Spevack v. Klein*, No. 62. The petitioner in that case refused to testify and to produce any of his records. He incriminated himself in no way whatsoever. The Court nevertheless holds that he may not be disbarred for his refusal to do so. Such a rule would seem justifiable only on the grounds that it is an

essential measure to protect against self-incrimination—to prevent what may well be a successful attempt to elicit incriminating admissions. But *Garrity* excludes such statements, and their fruits, from a criminal proceeding and therefore frustrates in advance any effort to compel admissions which could be used to obtain a criminal conviction. I therefore see little legal or practical basis, in terms of the privilege against self-incrimination protected by the Fifth Amendment, for preventing the discharge of a public employee or the disbarment of a lawyer who refuses to talk about the performance of his public duty.\*

In *Murphy v. Waterfront Commission*, 378 U. S. 52, the Court held that “a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.” 378 U. S., at 79. To implement this holding the Court further ruled that the Federal Government would be constitutionally prohibited from making any such use of compelled testimony and its fruits. This holding was based on the desirability of accommodating the interests of the State and Federal Government in investigating and prosecuting crime.

A similar accommodation should be made here, although the multiple interests involved are those of the State alone. The majority does not deny that the State and its citizens have a legitimate interest in ridding themselves of faithless officers. Admittedly, however, in attempting to determine the present qualifications of

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\*The opinion of my Brother DOUGLAS professes not to resolve whether policemen may be discharged for refusing to cooperate with an investigation into alleged misconduct. However, the reasoning used to reach his result in the case of lawyers would seemingly apply with equal persuasiveness in the case of public employees.

an employee by consultation with the employee himself, the State may ask for information which, if given, would not only result in a discharge but would be very useful evidence in a criminal proceeding. *Garrity*, in my view, protects against the latter possibility. Consequently, I see no reason for refusing to permit the State to pursue its other valid interest and to discharge an employee who refuses to cooperate in the State's effort to determine his qualifications for continued employment.

In my view, Spevack was properly disbarred. With all due respect, I therefore dissent.